

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 876.

ASTORIA MARINE IRON WORKS, PLAINTIFF IN ERROR,

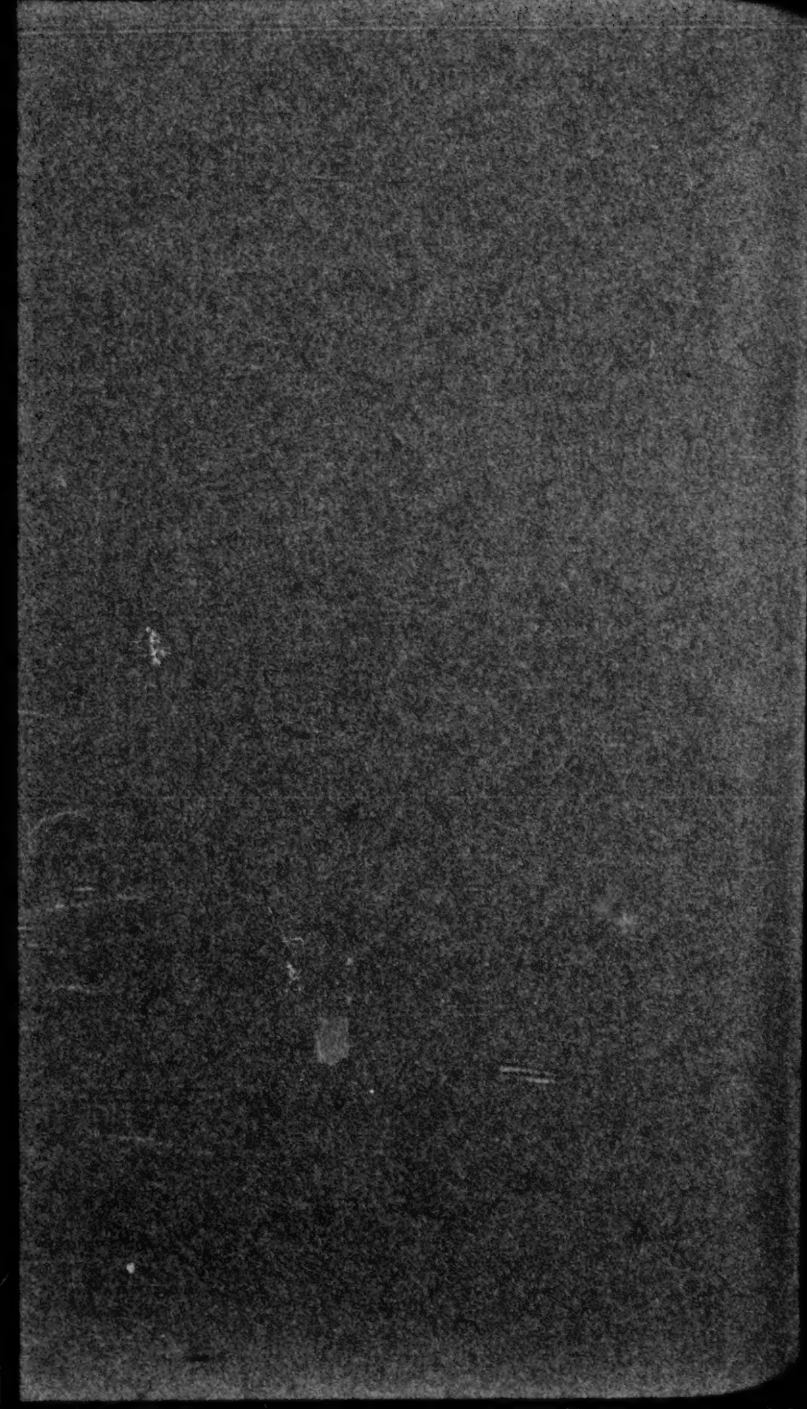
vs.

UNITED STATES SHIPPING BOARD EMERGENCY FLEET
CORPORATION.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF OREGON.

FILED OCT 11 1911

(125 221)



(28,331)

SUPREME COURT OF THE UNITED STATES.

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No. 376.

ASTORIA MARINE IRON WORKS, PLAINTIFF IN ERROR,

vs.

UNITED STATES SHIPPING BOARD EMERGENCY FLEET
CORPORATION.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF OREGON.

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1 In the District Court of the United States for the
District of Oregon.

ASTORIA MARINE IRON WORKS, a Corporation, Plaintiff,

vs.

UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION,
a Corporation, Defendant.

UNITED STATES OF AMERICA,
District of Oregon, ss:

To United States Shipping Board Emergency Fleet Corporation, a
corporation, Greeting:

You are hereby cited and admonished to be and appear at a
Supreme Court of the United States, at Washington, within sixty
(60) days from the date hereof, pursuant to a writ of error, filed in
the Clerk's office of the District Court of the United States for the
District of Oregon, wherein Astoria Marine Iron Works, a corpora-
tion, is plaintiff in error, and you are defendant in error, to show
cause, if any there be, why the judgment rendered against the said
plaintiff in error as in the said writ of error mentioned, should not
be corrected, and why speedy justice should not be done to the
parties in that behalf.

Witness, the Honorable Charles E. Wolverton, Judge of the Dis-
trict Court of the United States, this 28th day of April in the year
of our Lord, One thousand, nine hundred and twenty-one.

CHAS. E. WOLVERTON,
Judge of the United States District Court.

2 STATE OF OREGON,
County of Multnomah, ss:

I ——— one of attorneys for ——— do hereby certify that I
have carefully compared the copy of the within — with the original
thereof; and the same is a full, true and correct copy of such
original and of the whole thereof.

Service by copy admitted this 28th day of April, 1921.

HALL S. LUSK,
Attorneys for Defendant.

[Endorsed:] No. L8687. 27-132. In the District Court of the
United States for the District of Oregon. Astoria Marine Iron
Works, a corporation, plaintiff, vs. United States Shipping Board
Emergency Fleet Corporation, a corporation, defendant. Citation
on writ of error. U. S. District Court, District of Oregon. Filed
Apr. 28, 1921. G. H. Marsh, Clerk. Cake & Cake, L. A. Liljeqvist,
Attorneys for Plaintiff.

United States Supreme Court.

ASTORIA MARINE IRON WORKS, a Corporation, Plaintiff in Error,
vs.

UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION,
a Corporation, Defendant in Error.

Writ of Error.

THE UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Judges of the
District Court of the United States for the District of Oregon,
Greeting:

Because in the records and proceedings, as also in the rendition of
the judgment of a plea which is in the District Court before the
Honorable Charles E. Wolverton, one of you, between Astoria Marine
Iron Works, a corporation, Plaintiff, and Plaintiff in Error, and
United States Shipping Board Emergency Fleet Corporation, a cor-
poration, Defendant, and Defendant in Error, a manifest error hath
happened to the great damage of the said Plaintiff in Error, as by
complaint doth appear; and we, being willing that error, if any hath
been, should be duly corrected, and full and speedy justice done to
the parties aforesaid, and, in this behalf, do command you, if judg-
ment be therein given, that then, under your seal, distinctly and
openly, you send the record and proceedings aforesaid, with all things
concerning the same, to the Supreme Court of the United States,
together with this writ, so that you have the same at Washington
in the District of Columbia within sixty days from the date hereof,
in the said Supreme Court of the United States to be then and there
held; that the record and proceedings aforesaid, being then and there
inspected, the said Supreme Court may cause further to be done
therein to correct that error, what of right and according to the laws
and customs of the United States of America should be done.

Witness the Honorable Edward Douglass White, Chief Justice of
the United States this 28th day of April, 1921.

[Seal of United States District Court, Oregon.]

G. H. MARSH,
*Clerk United States District Court,
District of Oregon.*

4 The foregoing writ of error was served on the District Court
of the United States for the District of Oregon, by filing a
copy thereof with me as the clerk of said Court on this 28th day of
April, 1921.

G. H. MARSH,
*Clerk United States District Court,
District of Oregon.*

[Endorsed:] United States Supreme Court. Astoria Marine Iron Works, a corporation, Plaintiff in Error, vs. United States Shipping Board Emergency Fleet Corporation, a corporation, Defendant in Error. Writ of Error. Filed April 28, 1921. G. H. Marsh, Clerk United States District Court, District of Oregon.

5 In the District Court of the United States for the District of Oregon, July Term, 1920.

Be it remembered, That on the 16th day of October, 1920, there was duly filed in the District Court of the United States for the District of Oregon, a Transcript of Record on removal from the Circuit Court of the State of Oregon for Multnomah County, and that the complaint contained in the said transcript of record is in words and figures as follows, to wit:

6 In the Circuit Court of the State of Oregon in and for the County of Multnomah.

ASTORIA MARINE IRON WORKS, a Corporation, Plaintiff,

v.

UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION,
a Corporation, Defendant.

Complaint.

Comes now the plaintiff above named and for its cause of action against the defendant above named complains and alleges as follows:

I.

That the plaintiff now is and during all the times in this complaint mentioned was a corporation duly created, organized, and existing under and by virtue of the laws of the state of Oregon.

II.

That the defendant now is and during all the times in this complaint mentioned was a corporation duly created, organized, and existing under and by virtue of the laws of the District of Columbia, with power to sue and be sued, and said defendant is now and during all the times in this complaint mentioned was doing business in Clatsop and Multnomah counties, state of Oregon, and now has its principal office and place of business in Oregon in said county of Multnomah; that the defendant now is and during all the times in this complaint mentioned was doing business for the purpose of gain in the state of Oregon as a foreign corporation, and without first having filed the declaration or paid the entrance fees provided by statute and required by law before transacting business within said state and without being licensed by the corpora-

tion commissioner of the state of Oregon or at all to transact business in the state of Oregon, and without having paid the annual license fee required of said corporation by law or any portion thereof, and such delinquency has existed at all times in this complaint mentioned and still continues.

III.

That on or about the first day of February, 1919, the plaintiff and defendant entered into an agreement in writing which was placed in final form and mutually delivered to each other by the respective parties thereto on or about the 31st day of March, 1919, a substantially true and correct copy of which is hereto annexed marked Exhibit "I" for identification, and is hereby by reference incorporated into this pleading and made a part hereof as if herein at this place fully set forth.

IV.

That this plaintiff duly furnished and still maintains a suitable site at Astoria, Oregon, of which it has been and is the owner in fee simple, as provided in said agreement, for the location and construction of a marine railway of a lifting capacity of four thousand (4,000) tons, and a site for a repair plant and for the other purposes mentioned in subdivision 1, of paragraph I, of said agreement, and the interest of the plaintiff therein and thereto was and is free and clear from all liens or incumbrances, and said site had appurtenant thereto all riparian rights, including all necessary government permits as provided in said contract, and said site was
8 duly approved and selected by the defendant at a period of several months after said February 1, 1919, aforesaid.

V.

That this plaintiff, after the execution and delivery of said contract and approval of said site, proceeded promptly and in good faith, and was at all times ready, willing, and able to perform all things required of it under said contract, and began to prosecute the work of doing and causing to be done all necessary dredging, filling, bulk-heading and pier work, and all the other work required by it, preliminary to the construction of the marine railway and repair plant and the installation thereof upon said site, and for the purpose of having the same ready for operation together with all necessary power, heating, lighting, sanitary and other accessories and facilities required by said contract.

VI.

That this plaintiff furnished plans and specifications as provided in said contract for all piling and capping work, planking and decking, and all bulk-heading required and provided in said contract for the doing of bulkhead and pier work, and completed a large portion of said bulkhead and pier work required and provided to be done by

said contract and the plans and specifications prior to the construction of said marine railway and until work thereon was stopped for the causes and reasons hereinafter more fully stated, and all of such work so done was duly executed in compliance with the plans and specifications and said contract, and all of which was performed under the supervision and with the approval of the defendant.

VII.

That the Port of Astoria, a quasi-public corporation, organized and existing under the laws of the state of Oregon, duly agreed by resolution adopted on the 13th day of January, 1919, a copy of which is attached to said contract above mentioned and marked Exhibit "A," to do certain dredging and to supply the fill required in connection with said site and provided by said plans and specifications and said contract, and this plaintiff furnished an agreement of said Port with the defendant to perform dredging and supply the fill as in said resolution provided, and said Port of Astoria aforesaid did duly perform a large portion of the said dredging required and the supplying of said fill, and at all the times herein mentioned has stood ready, and is now ready, willing, and able to perform all things required in reference to said dredging and the supplying of said fill as provided in said contract.

VIII.

That a new and wider bridge was constructed jointly by the county of Clatsop and the Port of Astoria and substantially completed, as provided in said contract, and said county and said port have at all times herein mentioned been and are now ready, willing, and able to perform all conditions on their part to be performed with reference to said bridge, and this plaintiff did duly dedicate to the public for the said bridge a strip or parcel of land fifty (50) feet in width across the said premises at approximately the location of the prior bridge mentioned in said contract.

IX.

That a guaranty in the form attached to said contract and marked Exhibit "C" was duly made and executed by Thomas Bilyeu, the general manager and secretary of the plaintiff, and W. A. Viggers, the president of the plaintiff, for the construction of the railway provided in said contract and within the time therein specified and duly delivered to and accepted by the defendant.

X.

That the defendant demanded and insisted that the bond which it elected to require instead of a note provided in sub-paragraph (b) of sub-section (3) of Section III of said contract, and the mortgage mentioned in sub-paragraph (c) of sub-section (3) of Section III of said contract which defendant elected should be required instead of

a deed or deeds of trust, securing the said bond and the performance of the terms of said contract, should be prepared and furnished by it, the said defendant, and its attorneys, and not by the plaintiff; that said defendant failed and neglected to furnish or deliver to this plaintiff for execution a mortgage securing said bond and the performance of said agreement or contract executed by the parties as hereinbefore stated or the terms thereof, or of any modification of said contract; that said defendant failed and neglected to prepare or furnish any bond or mortgage, or deliver the same to this plaintiff for execution, which was necessary to effectuate the intent of said contract and agreement; and said defendant failed and neglected to furnish or submit to this plaintiff for execution any bond or note,

11 or any mortgage or mortgages, deed or deeds of trust, as mentioned, provided in, or called for by said contract, but on the contrary said defendant did on or about the 16th day of July, 1919, and not prior thereto, prepare and submit to this plaintiff for execution a certain mortgage, which mortgage in addition to the provisions therein contained purporting to secure the performance of the terms of said agreement included and had other terms therein, altering and changing the terms of said agreement entered into between the parties hereto wherein and whereby said defendant, without the consent of this plaintiff, attempted to make a new agreement between the parties hereto and add to the contract entered into by this plaintiff numerous and onerous terms and provisions not contained in the agreement theretofore executed and not within the contemplation of the parties nor agreed to by them and not the usual or customary or reasonable terms and provisions of a mortgage and all of the provisions which the said defendant required and demanded that this plaintiff should consent to, would substantially affect the position of the plaintiff and its right, title, and interest in and to its property and subject it to great and irreparable damage and injury, and liability to lose all of its said property, and a substantially true and correct copy of which said mortgage which the defendant demanded should be executed by this plaintiff, is hereto annexed marked Exhibit II for identification, and is hereby by reference incorporated into this pleading and made a part hereof as if at this place fully set forth.

XI.

12 Plaintiff further alleges that said defendant prepared and submitted said mortgage in the form and with the terms and provisions therein contained and with conditions so onerous upon the plaintiff that the defendant knew could not be reasonably met by the plaintiff, and which it had no right under said contract to require this plaintiff to accept or consent to, and for the purpose of causing a delay in the execution of the note or bond and mortgage, mortgages, deed or deeds of trust required by said agreement aforesaid, and thereby offering some pretended excuse to the defendant for failing, neglecting, and refusing to advance any of the sums of money provided in said agreement to be loaned and advanced by

said defendant, and plaintiff alleges that said defendant for some time prior to the 16th day of July, 1919, and ever since has intended to refuse to carry out the terms of the agreement to be performed by it as provided in said contract, and to advance any of the sums therein mentioned, and defendant has at all times since a short time prior to said 16th day of July, 1919, intended to refuse to assist in the building and construction of said piling, bulkheading, and decking required on said site and the construction of said marine railway, and has at all such times abandoned its intent to cause said railway to be constructed, and has refused to abide by and carry out the terms of said agreement.

XII.

That at the time of the execution and delivery of said contract dated February 1 as aforesaid, and at all times since and now the defendant has been indebted to the plaintiff by reason of other transactions between them, in a sum greatly in excess of the sum of \$30,000.00, and it was agreed between the parties that said
13 defendant should pay to said plaintiff the sums due to the plaintiff and to make available in cash for the use of the plaintiff the sum of \$30,000.00 mentioned in said contract over and above any current indebtedness of the plaintiff; that the defendant failed, neglected, and refused at all times herein mentioned and does still refuse to pay said sums, and by and with the consent of the plaintiff and the defendant said contract was mutually modified by the parties in respect to said \$30,000.00 and the provisions for the deposit of said sum by the plaintiff with a depository as mentioned was waived by the defendant and this plaintiff on or about the first day of June, 1919, commenced the performance of the work of construction under said contract and advanced all sums necessary for labor, materials, machinery, and other expenses and disbursements required in the performance of said agreement up to the 16th day of July, 1919, and for a long time thereafter and prior to the time the said defendant submitted to this plaintiff the said mortgage hereinbefore mentioned this plaintiff in good faith, and in performance of its agreement and the terms thereof, and before it had any knowledge that the defendant would by said mortgage aforesaid attempt without the consent of this plaintiff to alter its said contract, had expended for labor, materials, and other expenses and disbursements required by said contract the sum of \$30,000.00, which said sum was a reasonable sum for said work, materials, and disbursements, and the defendant was benefitted thereby in said sum; that defendant was not ready or willing, nor did it at the time of submitting said mortgage as aforesaid, nor
14 has it at any other time, been ready or willing nor has it offered, upon the execution of said mortgage aforesaid, nor upon the furnishing, delivery and acceptance of a note or bond, or a mortgage or mortgages, or a deed or deeds of trust as provided in said contract, as a concurrent act or at all, to advance any moneys or make any of the loans required to be made by it as provided in said contract, or at all.

XIII.

That said entire sum of \$30,000.00 was expended by the plaintiff with the knowledge and consent of the defendant, and substantially all vouchers therefor in defraying the various items of construction cost advanced by this plaintiff were approved by the defendant.

XIV.

That the said defendant abandoned its said contract and refused to carry out the terms and provisions thereof, refused to advance any of the installments or any sum or sums whatsoever as provided in said contract to be advanced by it, and refused to deposit any moneys in any Controlled Account for the purpose of carrying out said agreement or any account at all, and refused to offer to advance any moneys required by it; that plaintiff was at all times ready, willing, and able to execute the note or bond, and the mortgage or mortgages, deed or deeds of trust provided in said contract and do all things on its part to be performed, and is still ready, willing, and able so to do, and defendant has been at all times informed thereof, and plaintiff has demanded repeatedly of said defendant that it should carry out its said agreement and advance said sums, but the defendant has at all times wrong-
15 fully and unlawfully failed, neglected, and refused to advance any of the moneys to be advanced by it as provided in said contract, thereby by its own acts and conduct rendering it impossible for the plaintiff to complete said contract.

XV.

That after said contract was executed by the plaintiff and the defendant, a question arose as to whether or not a marine railway with a minimum lifting capacity of 5,000 tons instead of 4,000 tons provided in said contract, would best subserve the purpose of the defendant in entering into said contract and the use by the defendant of the said marine railway, wherefore and by reason whereof, the preparation and presentation by the plaintiff to the defendant of plans and specifications for a marine railway with a minimum lifting capacity of 4,000 tons was suspended until it could be determined by the defendant which plans and specifications it would require, and at no time did the defendant ever inform this plaintiff as to which of the said marine railways it would require to be constructed, whereby the plaintiff could prepare such plans and specifications for such railway, and the plaintiff was at all times and is still ready, willing, and able to prepare and furnish to the defendant plans and specifications for a marine railway of lifting capacity of 4,000 tons as provided in said contract; and plaintiff further alleges that all the work and labor performed and expended, materials and machinery furnished and supplied as herein mentioned, were performed, expended, furnished, and supplied in the prepara-

tion of the site, filling, the construction of piers and bulkheading for a marine railway, and all were requisite and necessary for the construction of such marine railway whether the same should be of a lifting capacity of 4,000 tons or of a capacity of 5,000 tons.

XVI.

That this plaintiff during the times of the expenditures for labor and materials, machinery, and other expenses and disbursements herein mentioned, did not know that the said defendant intended to refuse to carry out its said contract, but expected and believed that defendant would do so and would advance the sums of money required by said contract, and the said defendant at all times from the latter part of May, 1919, up to and until the month of February, 1920, kept a representative of said plaintiff upon the job who approved the purchases for materials and machinery and labor expended by this plaintiff, and who supervised and directed the performance of the work, all in compliance with the plans and specifications furnished by the plaintiff to said defendant and approved by defendant and this plaintiff between on or about the first day of June and the — day of —, 19—, at the special instance and request of the said defendant, with its consent and approval, and in performance of the conditions on the part of the plaintiff to be performed under said contract, paid out and expended large sums of money for labor and for materials purchased and furnished and for plant and general overhead and general construction costs of the reasonable and agreed value of \$128,053.74, a particular statement of which has been submitted to the defendant and audited by it, and is as follows, to wit:

	Labor.	Material.	Plant and general overhead.	Total.
Bilge Blocks and Rollers.. .. .		170.96	.....	170.96
Piling and Capping.....	10,598.09	20,502.13	4,313.53	35,413.85
Planing and Decking... ..	829.74	2,593.59	620.52	4,043.85
Bulkheading	4,112.20	5,683.40	1,904.79	11,700.39
Buildings	54.00	1,287.03	17.68	1,358.71
Machinery		3,103.59	.....	3,103.59
Tracks		254.42	.....	254.42
Pipe Lines.....		28.74	.....	28.74
Lighting		211.65	.....	211.65
Fire Protection.....		3.50	.....	3.50
Construction Overhead				
(Tools) .....		.....	7,285.91	7,285.91
Construction Overhead				
(Salaries) .....		.....	10,099.06	10,099.06
Administrative Overhead.. ..		.....	.....	10,336.38
Interest .....		.....	.....	2,612.97
Machinery .....		.....	.....	41,429.76
	15,594.03	75,268.77	37,190.84	128,053.74

XVII.

That on or about the 11th day of May, 1920, the defendant wrongfully and unlawfully attempted to rescind its said contract and notified this plaintiff that it would no longer be bound by said agreement, and wrongfully and unlawfully attempted to declare the same terminated, null, and void.

XVIII.

That the plaintiff has performed all conditions on its part to be performed under and by virtue of said contract, as modified and waived in the manner hereinbefore set forth, and has substantially complied with its agreement and ceased construction work only when and because of the failure, refusal, and neglect of the defendant to perform the conditions on its part to be performed under said contract; and this plaintiff in good faith and in part performance of its said contract has expended large sums of money, to wit the said sum of \$128,053.74, relying upon the promises of the

18 defendant to perform the conditions of said contract on its part to be performed; and plaintiff further alleges that said defendant wrongfully and unlawfully, and without giving any notice to this plaintiff of its intention so to do, or notifying this plaintiff to furnish or deliver to the defendant plans and specifications for a marine railway of a lifting capacity of not to exceed 4,000 tons, or furnishing for execution a note or bond, mortgage or mortgages, or deed or deeds of trust, as provided in said agreement, and without notifying this plaintiff of defendant's pretended claim or claims that the plaintiff was in default in any respect in the performance of its said contract, did repudiate said contract, declare the same terminated, and attempt to declare the same null and void; and plaintiff further alleges that said repudiation of said contract by the said defendant as above stated was pursuant to an intent upon the part of the defendant to refuse to carry out the terms of said agreement, and to advance any of the sums therein mentioned, entertained, and held by the defendant for some time prior to the 16th day of July, 1919, and at all times therefrom up to the time of said notice of attempted rescission, and which intent to breach said contract and refuse to carry out the terms thereof was unknown to the plaintiff during all the times of the expenditure by it of said sum of \$128,053.74 aforesaid, and by reason of all of which the said defendant should be and is estopped from attempting to allege a breach of said agreement or any of the terms, provisions, or conditions thereof by the plaintiff, and should be and is estopped from attempting to terminate the said agreement or to declare the same null and void.

That by reason of all of the foregoing the plaintiff has been damaged in the full sum of \$128,053.74; that plaintiff on the — day

—, 1920, demanded of defendant the payment of said sum, but defendant has refused to pay the same or any part thereof.

That plaintiff for its second cause of action against the defendant above named, complains and alleges as follows:

I.

That the plaintiff now is and during all the times in this complaint mentioned was a corporation duly created, organized, and existing under and by virtue of the laws of the state of Oregon.

II.

That the defendant now is and during all the times in this complaint mentioned was a corporation duly created, organized, and existing under and by virtue of the laws of the District of Columbia, with power to sue and be sued, and said defendant is now and during all the times in this complaint mentioned was doing business in Clatsop and Multnomah counties, state of Oregon, and now has its principal office and place of business in Oregon in said county of Multnomah; that the defendant now is and during all the times in this complaint mentioned was doing business for the purpose of gain in the state of Oregon as a foreign corporation, and without first having filed the declaration or paid the entrance fees provided by statute and required by law before transacting business within said state and without being licensed by the corporation commissioner of the state of Oregon or at all to transact business in the state of Oregon, and without having paid the annual license fee required of said corporation by law or any portion thereof, and such delinquency has existed at all times in this complaint mentioned and still continues.

III.

That on or about the first day of February, 1919, the plaintiff and defendant entered into an agreement in writing which was placed in final form and mutually delivered to each other by the respective parties thereto on or about the 31st day of March, 1919, a substantially true and correct copy of which is hereto annexed marked Exhibit "I" for identification, and is hereby by reference incorporated into this pleading and made a part hereof as if herein at this place fully set forth.

IV.

That plaintiff pursuant to the provisions of said contract has driven piling upon the site mentioned in said contract and has built bulkheads, piers, and other structures thereon in the performance of its contract and according to the plans and specifications, all of which were approved by the defendant, and which said contract the defendant wrongfully and unlawfully attempted to rescind and

to declare null and void, and which it refused to carry out by notice given to this plaintiff on or about the — day of — 1920.

V.

That in order to enable plaintiff to use the lands mentioned in said contract, it is necessary to remove the piling, decking,
21 and other structures erected and constructed thereon by the plaintiff in part performance of its said contract as aforesaid; that the reasonable cost of such removal is the sum of \$25,000.00, wherefore and by reason whereof plaintiff has been damaged in the sum of \$25,000.00, which defendant has refused to pay, although demand has been made upon it therefor.

Plaintiff for a third cause of action against the defendant, complains and alleges as follows:

I.

That the plaintiff now is and during all the times in this complaint mentioned was a corporation duly created, organized, and existing under and by virtue of the laws of the state of Oregon.

II.

That the defendant now is and during all the times in this complaint mentioned was a corporation duly created, organized, and existing under and by virtue of the laws of the District of Columbia, with power to sue and be sued, and said defendant is now and during all the times in this complaint mentioned was doing business in Clatsop and Multnomah counties, state of Oregon, and now has its principal office and place of business in Oregon in said county of Multnomah; that the defendant now is and during all the times in this complaint mentioned was doing business for the purpose of gain in the state of Oregon as a foreign corporation and without first having filed the declaration or paid the entrance fees provided by statute and required by law before transacting business within said state and without being licensed by the corporation commissioner of the state of Oregon or at all to transact business in
22 the state of Oregon, and without having paid the annual license fee required of said corporation by law or any portion thereof and such delinquency has existed at all times in this complaint mentioned and still continues.

III.

That on or about the first day of February, 1919, the plaintiff and defendant entered into an agreement in writing which was placed in final form and mutually delivered to each other by the respective parties thereto on or about the 31st day of March, 1919, a substantially true and correct copy of which is hereto annexed marked Exhibit "I" for identification, and is hereby by reference

incorporated into this pleading and made a part hereof as if herein at this place fully set forth.

IV.

That defendant on or about the — day of —, 1920, wrongfully and unlawfully attempted to rescind such contract, and defendant notified this plaintiff that said contract was terminated and attempted to declare the same null and void.

V.

That at the time of the execution of said contract by the plaintiff and the defendant, it was estimated by the parties thereto, and which was one of the inducing causes for the execution of said contract by the defendant, that the reasonable ordinary earning capacity and net profit of said marine railway when constructed which would accrue to this plaintiff would be the sum of \$55,000.00 per year for each of said five years mentioned in said contract, and said
 23 sum of \$55,000.00 per year was and is the reasonable net profit and earnings which would have been received by the plaintiff by the completion and operation of said marine railway, and which proximately and reasonably would accrue from such operation and of which this plaintiff has been deprived by the wrongful acts and conduct of the defendant and its breach of said contract as aforesaid, amounting in the aggregate for said period of five years mentioned to the sum of \$275,000.00, and plaintiff alleges that it has been damaged in the loss of prospective and anticipated profits by the unlawful breach of said contract by the defendant in said total sum.

Wherefore, plaintiff demands judgment against the defendant on its first cause of action in the sum of \$128,053.74; on its second cause of action in the sum of \$25,000.00 and on its third cause of action in the sum of \$275,000.00 and for its costs and disbursements herein.

CAKE & CAKE,
 L. A. LILJEQVIST,
Attorneys for Plaintiff.

STATE OF OREGON,
County of Multnomah, ss:

I, Thomas Bilyeu, being first duly sworn, say that I am Secretary of the plaintiff herein and make this verification on its behalf; that I have read the foregoing complaint and know the contents thereof, and the same is true as I verily believe.

THOMAS BILYEU.

Subscribed and sworn to before me this 31st day of August, 1920.
 [Notarial Seal.]

WM. M. CAKE,
Notary Public for Oregon.

My commission expires August 23, 1924.

EXHIBIT I.

Contract to Provide for the Construction of a Marine Railway at Astoria, Oregon.

Contract made this first day of February, 1919, between Astoria Marine Iron Works, a Corporation organized and existing under the laws of the State of Oregon, party of the first part (herein called the "Borrower"), and United States Shipping Board Emergency Fleet Corporation, a Corporation organized and existing under the laws of the District of Columbia (herein called the "Corporation"), representing the United States of America, party of the second part.

In consideration of the mutual promises of the parties and of other good and valuable consideration, the parties hereto hereby agree as follows:

I.

Work to be Done.

(1) The Borrower hereby agrees to furnish, and until the repayment of the loan as herein provided, to maintain a suitable site at Astoria, Oregon, approved by the Corporation, for the location and construction of (a) a Marine Railway of a lifting capacity of four thousand tons (4,000), and of (b) a sufficient repair plant, together with the necessary basin and piers for mooring vessels, anchorage and access and all necessary accessories and with such protection against marine pests and against fire and other hazards as may be required by the Corporation and with proper facilities, to be approved by the Corporation, for transportation to and from the site of freight and passengers. The site shall be owned in fee simple by the Borrower.

The interest of the Borrower in the site shall be free and *and* clear of all liens and encumbrances.

25 The site shall have appurtenant thereto riparian rights (including all necessary governmental permits) satisfactory and sufficient, in the opinion of the Corporation, to secure the safe and uninterrupted construction and operation of the Marine Railway repair plant.

(The site and its appurtenances, together with the basin and piers and other facilities thereon or in connection therewith, are hereinafter referred to as the "Site." The Marine Railway, with its accessories, supplies and equipment is hereinafter referred to as the "Marine Railway". The repair plant, with its buildings, supplies and equipment is hereinafter referred to as the "Repair Plant". The Marine Railway Site and Repair Plant are hereinafter together referred to as the "Plant".)

(2) The Borrower will do or cause to be done all necessary dredging, (including dredging to channel if required by the Cor-

poration) filling, bulkhead and pier work, construct the Marine Railway and Repair Plant, install them upon the Site and have them ready for operation as hereinafter provided, with all necessary power, heat, lighting, sanitary and other accessories and facilities, (including transportation facilities) approved by the Corporation, and with such structure equipment and devices for the protection of the Plant against fire and other hazards, as may be ordered by the Corporation. The Marine Railway will be constructed in accordance with plans and specifications and any modifications thereof or additions thereto as provided in subdivision (6) of this article. The Repair Plant and piers will be constructed, and the dredging and other work done in accordance with plans and specifications submitted by the Borrower and approved by the Corporation. The requirements for the protection of the plant against fire and other hazards, will be installed as ordered from time to time by the Corporation. The Marine Railway shall not be deemed to be complete until it shall have undergone to the satisfaction of the Corporation, but at the risk and at the expense of the Borrower, such tests or trials as the Corporation may reasonably require.

26 (3) The Borrower will, until repayment of the loan herein provided for, maintain and operate the Plant, such maintenance and operation shall be in accordance with provisions herein-after contained.

(4) The total cost of the Plant is estimated to be:

Marine Railway	\$170,000
Repair Plant	30,000
Piers	30,000
Bulkheads	15,000
Engineering services	5,000
	<hr/>
	\$250,000

Date of Completion.

(5) The Borrower agrees to prosecute the work hereunder at all times with the utmost vigor and dispatch and to complete the Plant according to said drawings and specifications, and to have same ready for operation in all respects with all accessories and facilities by the fifteenth day of September, 1919, unless delays shall be occasioned without the fault of the Borrower, by contingencies beyond its reasonable control. No delays shall be considered other than those of which notice in writing is promptly given to the Corporation.

Plans and Specifications.

(6) The Borrower shall furnish the drawings and specifications which shall be subject to approval by the Corporation and will submit for approval from time to time as needed, the detailed draw-

ings necessary for the work to be done hereunder. No drawings and specifications shall be used in connection with the work hereunder unless approved by the Corporation.

Alterations.

(7) The Corporation shall have the right to make such reasonable alterations, omissions, additions and/or substitutions in or to the drawings and specifications furnished by it, not materially affecting the general design, as it may deem necessary. The Borrower shall have the right to make such reasonable alterations, omissions, additions and/or substitutions, not materially affecting the general design, as the Corporation may approve.

(8) The Borrower represents and agrees that the Port of Astoria, a quasi-public corporation organized and existing under the laws of the State of Oregon, has agreed by a resolution adopted on the 13th day of January, 1919, a copy of which is hereto attached and marked "Exhibit A," to do certain dredging and to supply certain fill in connection with the Site, and the Borrower agrees to furnish to the Corporation, within Fifteen (15) days from date hereof, an agreement of the said Port with the Fleet Corporation to perform the said dredging and supply the said fill, as in said resolution provided. In case, however, for any reason the Port of Astoria should fail to complete said dredging as and when required by the Corporation, the Borrower agrees to do, or cause to be done, at its own expense, all dredging and filling required by the Corporation.

Attached hereto, and marked "Exhibit B," is a copy of the sworn financial statement of the Borrower as of October 31, 1918, which the Borrower hereby represents to be correct. The plant referred to in said statement is not a part of the "Plant" as herein defined.

II.

Loans. Amount to be Loaned.

(1) In consideration of the performance of this agreement by the Borrower, the Corporation agrees to advance from time to time, in the manner hereinafter provided, as a loan to the Borrower, any amount of money, equal to at least seventy per cent (70%) of the construction cost as hereinafter defined, but not to exceed (except at the option of the Corporation as hereinafter provided) the sum of One Hundred and Seventy-five Thousand Dollars (175,000). The Corporation will make the advances in such instalments as needed. The Corporation may, however, if it so elects, advance the total amount to be loaned in one or more instalments.

Moneys Loaned Deposited in Controlled Account.

(2) The moneys loaned (whether advanced in a single or in several instalments), together with certain funds of the Borrower as

hereinafter provided, shall be deposited in an account or accounts (herein called the "Controlled Account") in the name of the Corporation with a depository or depositories (herein called the "Depository"), to be designated by the Borrower and approved by the Corporation. The Depository shall either be a National Bank or a Bank or Trust Company which is a member of the Federal Reserve System. The first instalment shall be deposited when but not until the Corporation has received satisfactory assurance that the Borrower's funds have been furnished as required in subdivision (5) of this Article, and other instruments agreed to be furnished hereunder, delivered and accepted, and the sums required to be expended by the Borrower have been so expended. Concurrently with each deposit by the Corporation, the Borrower shall deposit in the Controlled Account an amount equal to nine-thirty-fifths (9-35) of the amount so deposited by the Corporation.

Purpose for Which Moneys Loaned May Be Expended.

(3) The moneys deposited in the Controlled Account shall (except as herein otherwise expressly provided) be withdrawn and used only in payment or reimbursement of the items of actual cost entering into the building and equipment of the Plant, hereinafter called "Construction Cost," and for no other purpose. The Construction Cost shall include the following items and no others: The net cost (after deducting all discounts, rebates and refunds) of materials, supplies and equipment used or delivered at the works of the Borrower for use *for use* in building or equipping the Plant (including approved advance payments); the cost of direct labor employed therein; and any items of overhead incurred solely and exclusively in connection with the construction of the Plant (excluding any part of the items of existing or future overhead expense incurred in connection with the business or activities of the Borrower other than construction of the plant). Construction Cost shall not include the cost of the Site, nor the cost of dredging or filling.

The moneys in the Controlled Account shall (except as herein otherwise provided), be withdrawn only upon checks or drafts drawn by the borrower and countersigned by the duly authorized representatives of the Corporation. Such checks will be countersigned only upon receipt of and in accordance with vouchers approved in form and substance by the duly authorized representative of the Corporation.

The title to moneys in the Controlled Account (by whomsoever deposited), and any interest that may be credited by the Depository thereon, shall be and remain in the Corporation. Such interest may be used along with the principal in payment of the Construction Cost, or it may be withdrawn as herein provided, but in either case the Borrower shall receive credit for all interest allowed by the Depository as and when the said interest is allowed.

When the Plant is completed, or when the proportion of the Construction Cost which the Corporation has agreed to advance shall

have borne out of the moneys advanced by the Corporation, or when the Corporation has exercised its rights, as hereinafter provided, to call the loan, the Corporation may, without counter-signature of the Borrower, withdraw from the Depositary, any balance, principal and interest, remaining on deposit in the Controlled Account, and apply same to the payment or reduction of the interest and principal of the loan.

Approval of Items of Cost.

The representatives of the Corporation shall be sole judges of the propriety of the inclusion in cost of any items to be paid out of the moneys loaned hereunder; subject, however, to an appeal to the Director General of the Corporation, as hereinafter provided. No payments will be authorized for materials, supplies or equipment unless they have been subjected to such inspection and have met such tests as the Corporation may require and unless the commitments therefor have been approved by the Corporation.

Expense That May Be Borne by Corporation as a Loan to Borrower.

(4) If the Borrower fails to insure, repair or operate the Plant, or keep it free from liens as hereinafter provided, or if the Borrower fails to perform any of its obligations in connection with the site, the Corporation may (in addition and without prejudice to any other remedies it may have) cause such obligations to be performed at the Borrower's expense. If the Corporation incurs expense for any of these purposes or for the purpose of completing or expediting the completion of the plant under the provision of Article VI hereof,

it may require these expenses to be paid out of the moneys agreed to be advanced as aforesaid, or, at the option of the Corporation or in the event that the maximum sum has been advanced and expended, the amount of these expenses shall at the option of the Corporation be deemed an addition to the loan to the Borrower hereunder, which the Borrower agrees to pay as hereinafter provided.

Borrower's Funds.

(5) All work to be done hereunder by the Borrower, and all obligations imposed upon it shall, except where expressly otherwise provided, be carried on at the cost and expense of the Borrower. Such cost and expense shall be borne by the Borrower from its own funds, except when and to the extent that the moneys loaned by the Corporation shall be available. In order to insure the possession of sufficient funds, the Borrower shall within five days (5 days) after execution of this agreement, have on deposit with Banks and/or trust companies approved by the Corporation, at least Thirty Thousand Dollars (\$30,000) over and above any current indebtedness of the Borrower. These funds shall be expended only for the construction maintenance and operation of the Marine Railway or Repair Plant, or, with the consent of the Corporation, for the ex-

tension of the Plant of the payment or reduction of the principal or interest of the moneys loaned hereunder.

At least Thirty Thousand *Thousand* Dollars (\$30,000) of the funds of the Borrower shall be expended (against vouchers approved by the Corporation) in defraying items of Construction Cost before the Corporation shall be required to advance any part of the moneys to be loaned by it hereunder. If the Borrower has expended more than Thirty Thousand Dollars (\$30,000) for this purpose prior to the time the first instalment of the loan is deposited hereunder, then the Borrower shall be entitled to reimbursement of the excess above such sum out of the moneys loaned by the Corporation hereunder.

III.

Repayment of Loan. Interest.

(1) Interest at the rate of six per cent (6%) per annum shall be paid (a) upon the unpaid portion of all moneys loaned from the respective dates of the respective deposits as aforesaid, and (b) upon the unpaid portion of the expense, if any, incurred by the Corporation as provided in subdivision (4) of Article II hereof (and not paid out of the sum deposited in the Controlled Account) from the date of the rendition to the Borrower of a statement of the expense incurred by the Corporation. All interest money shall be payable semi-annually on the 31st day of December and on the 30th day of June in each year until the loan is repaid. The first interest payment shall be made on the 31st day of December or the 30th day of June as the same may be, next following the deposit of the final instalment of the sums which the Corporation is required to deposit hereunder.

Repayment of Principal.

(2) The principal of the loan shall, unless declared to be due as provided in subdivision (4) of this article, be repaid as follows: Ten per cent (10%) of the amount of the loan shall be repaid at the Maturity Date. (By the term "Maturity Date" is meant the day six months from and after the date, as determined by the Corporation, of the completion of the Railway and its ability to haul a ship, but the Maturity Date shall not be later than March 28th, 1920. The remainder of the loan shall be paid as follows:

One payment of ten per cent (10%) six months after the Maturity Date.

One payment of ten per cent (10%) twelve months after the Maturity Date.

One payment of ten per cent (10%) eighteen months after the Maturity Date.

One payment of ten per cent (10%) twenty-four months after the Maturity Date.

One payment of ten per cent (10%) thirty months after the Maturity Date.

One payment of ten per cent (10%) thirty-six months after the Maturity Date.

One payment of ten per cent (10%) forty-two months after the Maturity Date.

One payment of ten per cent (10%) forty-eight months after the Maturity Date.

One payment of ten per cent (10%) fifty-four months after the Maturity Date.

32 The Borrower shall have the right to anticipate or increase any of said payments.

Reimbursement of Expenses Incurred by the Corporation.

The expense, if any, incurred by the Corporation, as provided in subdivision (4) of Article II (and not paid out of the sums deposited in the Controlled Account) shall be repaid by the Borrower on demand of the Corporation, or, at the option of the Corporation, on the date, to be specified in the demand, when the next instalment of principal or interest of the loan will fall due. The demand shall specify the amount and items of the expense incurred by the Corporation.

Bond and Mortgage.

(3) In order to secure the performance of this agreement, or any modification thereof, including, among other things, the performance of the Borrower's obligations concerning the Site, the proper and timely construction of the Plant, the repayment of the Principal and interest of all moneys loaned hereunder (including those loaned as provided in subdivision (4) of Article II hereof) and the repair, maintenance, insurance and operation of the Plant, as hereinafter provided, and to secure the transfer of title to the property described in Article VI hereof, if the Corporation should elect to take over title thereto as provided in said Article, the Borrower shall cause to be executed and delivered to the Corporation the following instruments (which shall be satisfactory in form to the Corporation, and the terms whereof the Borrower agrees will be performed):

(a) The guarantee, in the form hereto attached and marked "Exhibit C," by Thomas Bilyeu, the General Manager and Secretary, and W. A. Viggers, the President of the Borrower, of the construction of the Railway as herein provided within the time herein specified.

(b) The note or bond of the Borrower;

(c) A mortgage or mortgages or if the Corporation so elects a deed or deeds of trust (all such mortgages and/or deeds of trust are herein collectively called the "Mortgage") securing said note or bond and the performance of the terms of this agreement. The Mortgage shall be first lien upon the following premises situate, lying and

33 being in the County of Clatsop, State of Oregon, an approximate description of said premises being as follows:

All the riparian rights, tide lands, tide flats and privileges, water rights and wharfing easements adjacent to and in front of Lot One (1) in Section Nineteen (19) Township Eight (8) North, Range Nine (9) West of the Willamette Meridian, and also all the riparian rights, tide lands, tide flats and privileges, water rights and wharfing easements adjacent to and in front of that part of Lot Two (2) in said Section Nineteen (19) as lies east of a line drawn due North to the ship or main channel of Young's Bay from a point in the south line of said Lot Two (2) which point is half way between the east and west boundary lines of said Lot Two (2),

and upon all buildings, improvements (including the Repair Plant and Marine Railway) equipment and personal property now or hereafter erected or installed thereon or in connection therewith, and upon all options, easements or other rights in connection with the Site, and upon all riparian lands and riparian rights (or leasehold or other interests therein) appurtenant thereto and all other appurtenances, Said lands and interests therein, buildings, improvements, equipment, personal property, options, easements, rights and appurtenances being herein referred to as the "Mortgaged Premises."

A bridge of approximately twenty-four feet in width has been erected and is now maintained by the County of Clatsop across the above described premises. It is contemplated that the said bridge will be replaced by a new and wider bridge to be constructed jointly by the said County and the Port of Astoria. In the event of such construction it is proposed that the Borrower dedicate to the public for the said bridge a strip of parcel of land of fifty feet in width across the said premises, said strip or parcel to be in approximately the location of the present bridge, and in such event appropriate provisions will be made for the release of said strip or parcel of land so to be dedicated from the lien hereof and of the said mortgage.

34 The Borrower shall bear the expense (including any taxes, stamp or other, and including the charges of any attorneys, and except as herein otherwise provided, of any persons other than the salaried employees of the Corporation) incident to the survey of the Site, the examination of title, the furnishing of a title policy if required by the Corporation, the preparation, execution, revision, filing and/or recording of the above mentioned instruments and of any other papers or instruments, and the doing of any other acts required to effectuate the intent of this subdivision (3)

Earlier Maturity of Loan.

(4) In any one of the following events the Corporation may withdraw from the Depositary any sums then on deposit in the Controlled Account, and/or decline to make further advances, and/or may declare the whole of the unpaid principal and interest immediately due and payable.

(a) If there is a destruction of what the Corporation shall determine to be a substantial part of the Plant, whether before or after its completion, and whether due to causes insured against or otherwise; provided, however, that the Corporation will not exercise its right under this subdivision if the Plant can be repaired or reconstructed, and ready for operation within a reasonable time, and if the security for the repayment of the loan hereunder and under the instruments furnished under subdivision (3) of this Article is not materially impaired.

(b) If the performance under this contract is unsatisfactory to the Corporation.

(c) If a petition in bankruptcy is filed by or against the Borrower, or the Borrower shall make an assignment for the benefit of creditors or do an equivalent act, or if a receiver, assignee or liquidating agent is appointed for the whole or any part of the Mortgaged Premises, or if a judgment, decree or order for equestration is entered affecting any part thereof.

(d) If the Borrower shall sell or encumber the Mortgaged Premises or any part thereof, without the consent of the Corporation, or if, with the consent of the Borrower, the Mortgaged Premises are or become encumbered by a lien prior to the lien of the
35 Mortgage, and proceedings are commenced by the holder of such prior lien to enforce or foreclose his rights in connection therewith.

(e) If there is a default in the performance of any of the terms of this agreement or of any modification thereof or of any of the terms of the instruments furnished under subdivision (3) of this Article, regardless of the materiality of the breach.

(f) If the Corporation exercises its rights under subsection (a) of subdivision (2) of Article VI hereof.

(g) If without the consent in writing of the Corporation there is any change in the management or control of the Borrower, except such as may be occasioned by death.

(h) If any representation or representations of the Borrower herein contained, or contained in the proposal for the construction of the Railway dated November 15, 1918, and submitted by it to the Corporation, are false.

The Corporation shall before exercising its rights as aforesaid, give fifteen days notice in writing to the Borrower, specifying the reason for its action. If before the expiration of the fifteen days, the Borrower shall have remedied the matters referred to, or shall have taken approved steps to remedy them, or shall have furnished satisfactory security indemnifying the Corporation against loss, expense or damage by reason thereof, the Corporation will consider withdrawing such notice.

The failure to execute its rights upon the happening of any of

the foregoing events shall not constitute a waiver nor effect the right of the Corporation to exercise its rights hereunder upon the subsequent happening of any of the specified events.

IV.

Inspection and Audit. Statements.

The Corporation may have its architects, engineers, auditors, bookkeepers, timekeepers and other representatives actually on the work. Such representatives shall have full access to all parts of the work and to the books, accounts and records of the Borrower. The accounts pertaining to the work hereunder, will be kept separate from all other accounts of the Borrower and in such a manner (to be specified or approved by the Corporation) as will disclose
36 readily and adequately, all information necessary to determine the cost of the work hereunder, both in total and in detail. The Borrower will, from time to time, furnish such accounting or other statements and reports as the Corporation may require in order to keep in touch with the work and to safeguard its interests hereunder. All accounts, records, and supporting papers will be preserved for such period not exceeding the period of the applicable statute of limitations as the Corporation may desire. The Corporation may, from time to time designate a person to act as its representative on the work and to him shall be referred all questions arising under the contract, at the work. Unless the Borrower is otherwise instructed the District plant engineer of the Corporation for the Eleventh District, shall be such representative. Such representative shall have the right to condemn and order the removal of any defective work or material and his orders shall be promptly complied with.

V.

Insurance.

The Borrower will, until repayment of said loan, place and maintain insurance upon the Plant in proper amount with Companies approved by the Corporation to cover work done and materials, supplies and equipment on hand for or appropriate to the use upon the Plant in and about the premises of the Borrower. Such insurance shall provide against the usual risks and against any other risks which the Corporation may require to be insured against, and shall be for an amount sufficient to indemnify the Corporation against loss of the loan made under this contract, and unless otherwise agreed, such insurance shall at least equal the amounts loaned hereunder and unpaid (principal and interest), provided that the amount of insurance required shall not at any time exceed the amount available in the insurance market. The original policies shall be deposited with the Corporation. The policies shall provide that the loss, if any, shall be paid to the Corporation in trust for

the Corporation and the Borrower as their interests may appear subject to the following distribution. The proceeds under the policies shall be held and applied by the Corporation for the following purposes:

37 (a) In case the loan or any part of it shall then or thereupon be or become due under any of the provisions of Article III hereof or otherwise, the insurance proceeds shall, at the option of the Corporation, be applied to the payment of the principal and interest of said loan or such part thereof as shall then be due and payable.

(b) The proceeds not required to pay any part of the loan that may then be due shall (until the money loaned by the Corporation shall have been fully repaid) be deposited as provided in subdivision (2) of Article II hereof and be expended by the Borrower for the repair or reconstruction of the Plant or to reimburse the Borrower for expenditures made by it for such purposes, after the occurrence of the contingency insured against. In such a case, all the provisions of this agreement, in so far as they are applicable, shall apply to the repair, reconstruction, operation and maintenance of the Plant and to the use and security of the moneys expended for such purposes. In the event that not all of the insurance proceeds shall be needed for the repair or reconstruction of the Plant, such excess shall be paid to the Borrower.

(c) If the principal and interest of the loan has been repaid the proceeds remaining thereafter shall be paid to the Borrower.

VI.

Rights of Corporation if Progress in Completing Plant Unsatisfactory.

In case of failure or omission of the Borrower, at any stage of the work prior to the completion of the construction of the Plant, from any cause or causes, to go forward with the work and make progress towards its completion satisfactory to the Corporation, the Corporation shall, at its option (in addition and without prejudice to any other remedies that it may have), have the following rights and remedies:

(1) The Corporation may require the Borrower at its own expense to increase the number of men employed upon the work, and/or the number of shifts used. If this requirement is not complied with, the Corporation may enter upon the work and take control thereof for such time as may be necessary to enforce its order, and the cost and expense incurred by the Corporation (including the cost of
38 superintendence) shall be borne by the Borrower and may, at the option of the Corporation, be deemed a loan to the Borrower.

(2) The Corporation may, upon five (5) days' notice to the Borrower, enter the Site and take possession of the Plant and of any

supplies, material and equipment therefor, and all accounts and records pertaining thereto. The Corporation may thereupon proceed to complete the Plant in a reasonable and economical manner, in accordance with this contract or otherwise, either at the works of the Borrower and with the equipment, yard and facilities (including contracts applicable to the work hereunder) of the Borrower (which will be rendered available to the Corporation) or otherwise, by contract or otherwise, and, in its discretion, use for this purpose all suitable materials and equipment on hand. The Corporation shall, upon exercising any rights under this Article, cause to be taken and filed in the United States Shipping Board a statement and inventory of all work done or begun on or about the Plant and of all supplies, materials and equipment on hand applicable thereto.

(a) The work may be done for the account of the Borrower, in which event all expenses incurred by the Corporation in the completion of the Plant (including the cost of superintendence) shall, at the option of the Corporation, be deemed a loan to the Borrower.

(b) The Corporation may, if it shall so elect, cancel the indebtedness of the Borrower and take over the title to the plant and to all the materials and equipment therefor, and to the other property, if any, mortgaged or pledged, or any part thereof. In this event, the Corporation shall pay to the Borrower the agreed value, at the date of the exercise of the option, of the property, the title to which vests in the Corporation, less payments made and expense incurred by the Corporation. If the value cannot be agreed upon, it shall be determined as provided in Article VII hereof.

Contracts Assignable to Corporation.

In order further to effectuate the provisions of this Article, the Borrower agrees that every contract made by it for the furnishing to it of material, equipment or supplies, or the use thereof, for use in the construction of the plant shall in its terms be made assignable to the Corporation.

VII.

Disputes.

(1) In case the parties fail to agree as to any matter connected with this contract, or if any doubt or dispute arises as to the meaning or effect of this contract or of any term thereof, or of the drawings and specifications, or as to the manner of doing the work provided hereunder, or as to materials used or the time to be allowed or the amounts to be paid or allowed, or as to any other particular, the matter shall be promptly referred to and determined by the Director General of the Corporation, and his decision shall be final and binding upon the parties, but subject to appeal as hereinafter provided.

(2) In case after the completion of the plant or after the Corporation has exercised or expressed its desire to exercise its right under Article VI or under subdivision (4) of Article III hereof, the Borrower shall deem that it is aggrieved by any decision of the Director General as to any disputed matter hereunder of any kind regarding the work (except as to the determination of items of Construction Cost to be paid out of the loan hereunder, as to which determination the decision of the Director General shall be final and binding) and shall give written notice to the Corporation to that effect, naming in such notice the arbitrator to be appointed by it as hereinafter provided, within thirty days (30) after the completion of the plant or the exercise by the Corporation of the rights under Article VI or Article III, as the case may be, such matter shall be determined by a Board which shall consist of three disinterested engineers or other experts to be appointed, one by the Corporation, one by the Borrower, and the third by the two appointed, or if the two cannot agree upon a third arbitrator, then the third shall be appointed by a disinterested board or body to be designated by the Corporation. The Board of Arbitrators shall within thirty (30) days after submission of any matter to it, make its determination, and such determination made by a majority of the Board, shall be conclusive upon both parties, provided, however, that if the Borrower fails to notify the Corporation in writing of its intent subsequently to appeal any decision of the Director General of the Corporation within thirty (30) days after written notice of such decision, such decision shall become final and binding upon both parties without appeal to the Board herein provided for. The cost of any such arbitration shall be borne equally by the Corporation and the Borrower.

VIII.

Liens.

The Borrower shall keep the Plant in course of construction free and clear from all claims, liens, or any encumbrance of any kind or description except the liens referred to in subdivision (3) of Article III hereof, and shall on completion show to the satisfaction of the Corporation that said Plant is free and clear from every claim, lien and encumbrance, except as aforesaid, and after completion shall, until the repayment of the loan hereunder, keep the plant free from any liens or claims which may affect the security of the Corporation hereunder, or affect or impede the operation of the Plant as hereinafter provided.

IX.

Protection of Property.

The Borrower shall provide the usual protection (watchman, enclosures and the like) against trespassers, for the Plant while under construction and when completed and shall furnish at the cost and

expense of the Corporation such additional protection as the Corporation may require.

X.

Permits.

The Borrower agrees to comply with all laws, rules, regulations and requirements of the various departments of the United States affecting the construction of works, plants, and vessels, in or on navigable waters and the shores thereof, and all other waters subject to the control of the United States, in so far as the same are applicable to the work to be done under this contract, and to procure all permits from the United States, State and local authorities which may be necessary to begin and carry on the work hereunder, and at all times to comply with all United States, State and local laws in any way applicable and affecting the work carried on under this contract.

XI.

Repair and Operation of Plant.

Until the moneys loaned hereunder are repaid, but in any event, until the Maturity Date, the following additional provisions shall be in force.

41 (1) The Borrower shall keep and maintain the Plant in good and substantial repair, and as hereinbefore provided, free and clear of liens and properly insured.

(2) The Borrower shall operate the Plant according to the rules and regulations and charges made by the Borrower and approved by the Corporation or the United States Shipping Board. The charges which shall be made by the Borrower in connection with the Plant shall be reasonable and shall not exceed those prevailing in the eleventh District.

(3) The Marine Railway shall be open to all proper vessels, which require repairs necessitating their being dry-docked, for the purpose of their being docked thereon; and, for the purpose of doing work on vessels while docked thereon, the Marine Railway shall be open to owners of such vessels and to other properly qualified persons under such restrictions and rules as the Corporation or the United States Shipping Board or agencies appointed by them may direct or approve; no greater rate shall be charged for dockage than is charged by the Borrower in the case of vessels docked and repaired by it.

Where repair work is sought to be done by persons other than the Borrower upon the vessels docked or to be docked upon the *the* Marine Railway, the Borrower may require reasonable assurance (the nature and form of these assurances to be controlled by the Shipping Board) that such vessels shall not remain on the Marine

Railway for a period longer than two (2) weeks, unless this period is required to be extended by the Shipping Board in connections with vessels of the United States. No person owning or controlling a dry dock, Marine Railway or other docking facilities, shall be permitted to avail himself of the privilege of doing work upon the Marine Railway unless he shall have filed with the Shipping Board a stipulation that the docks or railways owned or controlled by him will likewise be open docks under the same terms and conditions as the Marine Railway.

(4) Preference shall be given in the use of the Plant in such manner and to such vessels as the Corporation or the United States Shipping Board may prescribe, but the rights under this sub-
42 division shall be exercised under such reasonable rules as will prevent any unnecessary hardships to the private business of the Borrower.

(5) No part of the Plant shall be moved from the Site approved by the Corporation except with the written consent of the Corporation and under such restrictions as the Corporation may provide.

(6) Seventy-five percent (75%) of the gross docking charges upon all vessels docked upon the Marine Railway shall be paid to the Corporation, at times to be fixed by it, and applied, first upon the interest then accrued and thereafter in payment or reduction of the instalments of the principal of the loan thereafter falling due hereunder. In the event that no specific docking charges is made upon any vessel or that a docking charge lower than the usual charge is made, or that a charge is made but is not collected owing to the failure of the Borrower to enforce its lien against the vessel docked, the Corporation shall nevertheless be paid seventy-five percent (75%) of the usual docking charge. The Borrower will render, at times to be fixed by the Corporation, statements of vessels docked thereon and of the docking charges applicable thereto, and containing such other data as the Corporation may require.

(7) No dividends shall be declared or paid unless the Borrower shall show to the satisfaction of the Corporation, that it has financial resources sufficient to insure adequate working capital for the proper operation of the Plant.

The salaries paid by the Borrower shall be subject to the approval of the Corporation.

If the Borrower fails to comply with any of the provisions of this Article, the Corporation may do or cause the work, including the operation of the Plant to be done by others, at the expense of the Borrower. For this purpose, the Corporation and its agent, or any other proper persons authorized by the Corporation, shall have complete access to the Plant and to the Site. The expense incurred by the Corporation shall, at the option of the Corporation, be deemed a
43 loan to the Borrower. In the event that the Corporation makes any outlays as aforesaid, then, in addition and without prejudice to any of its other rights and remedies, the

Corporation shall have a lien upon the entire net earnings of the Borrower from the operation of the Plant until its outlays are repaid with interest, and such earnings are hereby assigned to the Corporation.

XII.

Participation in Profits.

No member of, or delegate to Congress, or Resident Commissioner, is or shall be admitted to any share or part of this contract, or to any benefit that may arise therefrom, but this Article shall not apply to this contract so far as it may within the operation or exception of Section 116 of the Act of Congress, approved March 4th, 1909 (35 Stats., 1109).

XIII.

Corporation in Its Discretion to Use Power for Expedition.

The Corporation may, in its discretion, use its influence and such powers as it may have by law to secure with the utmost practicable expedition and at the minimum cost consistent with the existing conditions, the facilities, utilities, parts, materials and supplies required for the work under this contract and may, in its discretion, also use its influence and powers to secure rail and/or preferential transportation from any and all railroad companies and public service companies for workmen, employees, materials, parts and supplies required for the work.

XIV.

Contract and Commitments for Materials, Supplies and Equipment.

(1) No commitment or contracts for materials, supplies or equipment for use in constructing the Plant and entering into the cost of the work, shall be made without submitting the proposed commitments or contracts to the Corporation and obtaining its consent thereto. The Corporation may furnish to the Borrower, at the Borrower's expense, any materials, equipment supplies or facilities necessary in connection with the work hereunder. If the Government furnishes any of such materials, equipment, supplies or facilities it shall not be responsible for any delays in the delivery thereof nor, beyond the obligations to repair or replace where defective, for any defects therein.

(2) It is recognized in view of existing conditions, that it may become necessary for the United States to exercise complete
44 control over the manner and priority in which materials, supplies and equipment necessary for the work hereunder are obtained by or furnished to the Borrower. It is agreed between the parties hereto that, if required by the Corporation and/or the United States, the Borrower will promptly submit to the Corporation

and/or the United States, a classified schedule of the Borrower's requirements for all materials, supplies and equipment to be used under this contract and copies of any and all contracts, agreements or orders for such materials, supplies and equipment and the Borrower hereby agrees that it will promptly comply with and be bound by any and all instructions issued by the Corporation and/or the United States with respect to such contracts, agreements or orders for materials, supplies and equipment.

XV.

Assignments. Sub-contracts.

The Borrower will not assign this agreement nor any interest therein nor will it, without the consent of the Corporation in writing, sub-let any part of the work. The Borrower will, upon the written direction of the Corporation, sub-let any part of the work of constructing the Plant.

XVI.

Borrower's Interest in Sub-contracts.

The Borrower shall not make any contract agreement or arrangement concerning the construction of the Plant with any other person, firm or corporations in which the Borrower is interested as an officer, director, stockholder or otherwise, or with any affiliated controlling or controlled firm or corporation, unless such sub-contract, agreement or arrangement and the relationship of the parties are first submitted to the Corporation and its assent in writing obtained. In case any contract, agreement or arrangement is made by the Borrower as above provided, the Corporation may require the Borrower to cancel it forthwith, in which event there shall be no liability upon the Corporation, the Borrower hereby agreeing to obey the Corporation's instructions with respect thereto and to save harmless and indemnify the Corporation against any claim which might be made against it on account of such cancellation. Payments under any such contract, agreement or arrangement that is not approved as aforesaid will not be considered as entering into Construction Cost, nor entitled to be reimbursed out of moneys loaned by the Corporation hereunder.

45

Warranty Regarding Commissions.

The Borrower expressly warrants that it has employed no third persons to solicit or obtain this contract in its behalf or to cause or procure the same to be obtained upon compensation in any way contingent, in whole or in part, upon such procurement; and that it has not paid, or promised or agreed to pay, to any third persons in consideration of such procurement or in compensation for services in connection therewith, any brokerage, commission or percentage upon the amount receivable by it hereunder, and that it has not, in estimating the contract price demanded by it, included any sum by

reason of any such brokerage, commission or percentage, and that all moneys payable to it hereunder are free from obligation to any other persons for services rendered or supposed to have been rendered in the procurement of this contract. Any breach of this warranty shall (in addition and without prejudice to any of the other remedies of the Corporation) constitute adequate cause for the annulment of this contract by the Corporation and shall entitle the Corporation to require the payment to it by the Borrower of any brokerage or commission so paid or agreed to be paid. The obligation to make such payment shall be secured by the Mortgage furnished hereunder.

XVII.

Further Assurances.

The Borrower shall execute or cause to be executed such instruments and do such acts as the Corporation may deem necessary to effectuate the intent of this agreement.

XVIII.

Successors and Assigns of Corporation.

This contract and all rights hereunder and under any instruments executed in connection herewith shall enure to the benefit of and be binding upon the successors and assigns of the Corporation.

XIX.

Miscellaneous.

(1) Whenever the term "Director General" is used herein, it shall be deemed to mean the present Director General of the Corporation, his successors in office, and if the office of Director General is abolished, the person designate- by the Corporation as the chief executive officer of the Corporation. The powers, duties and
46 discretions of the Director General hereunder, shall enure to and devolve upon the chief executive officer of the successor of the Corporation.

(2) Wherever a notice, statement, or demand is provided for hereunder, it shall be made in writing, and personally delivered, or mailed by registered mail, to the last known address of the party to be notified. The period of the notice shall run from the date of the delivery or registering of the notice.

This agreement may, at the option of the Corporation, be declared null and void, if the instruments to be furnished by the Borrower under subdivision 3 of Article III hereof are not submitted for approval within thirty days after the execution hereof.

In witness whereof, the parties hereto have caused these presents to be executed, and their respective common or corporate seals to be

hereto affixed by their respective officers thereto duly authorized, the day and year first above written.

(Signed)

By W. A. VIGGERS, *President.*

Attest:

(Signed) THOMAS BILYEU,
Secretary, Clerk.

UNITED STATES SHIPPING
BOARD EMERGENCY FLEET
CORPORATION,

(Signed)

By HOWARD COMLEY,
Vice-President.

Countersigned by

Attest:

(Signed) STEPHEN BOWEN,
[SEAL.] *Secretary.*

47

EXHIBIT "A."

Be it further resolved that should the Astoria Marine Iron Works conclude that it is to its best interest to construct and operate the Marine Railway above mentioned on Youngs Bay or Youngs River below the Youngs Bay County Bridge, and shall satisfy the Port that it has a contract with the United States Shipping Board or Subsidiary Board, providing for the construction of a Ship's Railway, and satisfy the Port that it will be able to secure the necessary capital to complete the same, then, in that event, the Port agrees to dredge a channel leading from the channel of the Columbia River into Youngs Bay as far as the said County Bridge, leading from the foot of Fifth Street, to an average width of 300 feet, and to an average depth of 18 to 19 feet at mean lower low tide, the Port, of course, to do this dredging without any cost to the Astoria Marine Iron Works, this being a public work and not a private enterprise.

The Port further agrees that inasmuch as it will be necessary to take care of the debris and sand pumped from the bed of the channel of the river, it will deliver such sand upon the works of the Astoria Marine Iron Works, or such other parties as desire the same, who will build bulkheads or retaining walls, free of charge.

Should the Astoria Marine Iron Works conclude to build its Marine Railway in Youngs Bay, according as herein suggested, and suitable arrangements will be made for such purpose, the Port agrees to do the same dredging at the earliest reasonable time, taking into consideration the weather conditions. In any event, the Port agrees to begin the construction of the work at the earliest possible opportunity, and prosecute the same vigorously until completed. It is believed that unless some unforeseen accident arises, the dredging

will be completed long before the Ship's Railway Plant will be completed, and such will be the intention of the Port in that regard.

I, R. R. Bartlett, Chief Engineer of the Port of Astoria, and Secretary pro tem, do hereby certify that the foregoing copy of resolution, is a true, full and correct copy of the resolution duly offered and adopted at a meeting of the Commissioners of the Port of Astoria held on the 13th day of January, 1919, at the hour of 2:30 P. M., in the office of said Port.

Dated this 17th day of January, 1919.

[SEAL.]

R. R. BARTLETT,
Chief Engineer and Secretary pro tem.

EXHIBIT "B."

Financial Statement.

Astoria Marine Iron Works.

October 31st, 1918.

Resources.

Fixed Plant and Equipment.....		\$280,864.91
Expenditures to Job Orders in progress..	\$98,148.34	
Less Advanced Billing	31,224.57	
		<hr/> 66,923.77
Inventory:		
Shop Stores and Merchandise.....	11,157.58	
Foundry Supplies Blacksmith Coal..	7,815.41	
Mess House Supplies	50.00	
Flavel Hotel Supplies	1,442.75	
		<hr/> 20,465.74
Accounts Receivable:		
Commercial Accounts	42,788.52	
Emerg. Fleet Instaln. Reimbursemt.	49,268.44	
" " Advance	3,158.57	
" " Shop Matl. Sales.....	2,093.21	
" " Special Jobs	11,199.17	
		<hr/> 108,507.91
Commercial Advances		50.00
Claims Receivable:		
S. P. & S. Railway		6.90
Cash and Bank:		
Scandinavian-American Bank	31,347.96	
Petty Cash	25.00	
		<hr/> 31,372.96
Liberty Bonds		500.00
Deferred Items:		
Unexpired Insurance, Prepaid.....		2,080.57
Expense:		
Miscellaneous Undistributed Items.....		20.00
Total resources		<hr/> <hr/> \$510,792.76

Liabilities.

Notes Payable	57,400.00
Accounts Payable	65,148.26
Paymaster—Bank	38,579.50
Individuals—Personal	288.13
Employees' Benefit Deductions.....	1,185.02
Accrued Interest	371.95
Accrued Pay Rolls:	
Pay Rolls October 31st.....	4,313.82
Less Pay Roll advances.....	279.41
	<hr/> 4,034.41
Total Liabilities	\$167,007.27
Reserves—War Plant Amortization	215,712.33
Profit and loss	28,073.16
Capital stock	100,000.00
	<hr/>
Contra	\$510,792.76

Certified correct:

(Sgd.)

BERNARD JACOBS,

Accountant.

Subscribed and sworn to before me this 15th day of November,
1918.

(Sgd.)

J. A. JACKSON,

Notary Public for Oregon.

49 STATE OF OREGON,
County of Clatsop, ss:

This is to certify that I have compared the within statement with
the original, which is filed herewith and made a part of this Exhibit,
and that the same is a true copy.

(Signed)

THOMAS BILYEU.

Subscribed and sworn to before me this 15th day of November,
1918.

[SEAL.]

(Signed)

E. F. CATHRO,

Notary Public for Oregon.

My Commission expires Nov. 7th, 1919.

50

EXHIBIT "C."

Know all men by these presents, That we, the undersigned,
Thomas Bilyeu and W. A. Viggers, each of Astoria, in the County
of Clatsop and State of Oregon, in consideration of One Dollar (\$1.00)
to each of us in hand paid by the United States Shipping Board
Emergency Fleet Corporation, a corporation organized and existing
under the laws of the District of Columbia, representing the United
States of America, the receipt of which is hereby acknowledged, and
in further consideration of the execution by the said United States

Shipping Board Emergency Fleet Corporation, at the request of each of us, of a certain contract dated the first day of February, 1919, with the Astoria Marine Iron Works, a corporation organized and existing under the laws of the State of Oregon, the said contract providing, among other things, for the construction of a Marine Railway in the said Astoria, do hereby, jointly and severally, guarantee to the said United States Shipping Board Emergency Fleet Corporation, its successors and assigns, the completion of the said Marine Railway by the said Astoria Marine Iron Works, in accordance with the requirements of said contract and within the time therein specified, and do hereby jointly and severally agree to indemnify and save harmless the United States Shipping Board Emergency Fleet Corporation from and against any loss, cost, damage or expense to it, caused by any failure of the said Astoria Marine Iron Works so to complete the same.

Witness:-

51

EXHIBIT II.

Mortgage in Connection with the Contract Number Fifteen, Dated February 1, 1919, by and Between Astoria Marine Iron Works and United States Shipping Board Emergency Fleet Corporation.

Parties.

Indenture dated the — day of —, 1919, by and between Astoria Marine Iron Works, a corporation organized and existing under the laws of the State of Oregon, party of the first part (herein called the Borrower), and United States Shipping Board Emergency Fleet Corporation, a corporation organized and existing under the laws of the District of Columbia (herein called the Corporation), representing the United States of America, party of the second part.

Recitals.

Whereas the parties hereto have executed a contract (herein sometimes called the "Construction Contract"), dated February 1, 1919, to provide for the construction of a Marine Railway, a copy of which contract is hereto annexed, marked "Schedule A," which contract is hereby made a part hereof; and

Purposes of Issue.

Whereas by the terms of the Construction Contract, and to secure the performance of the agreements herein contained, and for other purposes therein specified, including the repayment of the principal and interest of all moneys to be advanced by the Corporation as

therein provided, the Borrower undertook to cause to be executed and delivered to the Corporation divers instruments including this indenture; and

Authorization by Stockholders and Directors.

Whereas the Borrower, in pursuance of resolutions duly adopted by the unanimous vote of its entire Board of Directors, at a meeting of said Board duly called and held, has determined and agreed that for the purposes of said contract it is necessary and expedient to borrow from the Corporation the moneys, the loan or advance of which the Construction Contract contemplates, and to that end, and to secure to the Corporation the performance of all the terms of said contract, the Borrower has by said votes of its directors, authorized the creation and issue of its First Mortgage Gold Bond substantially in the form and containing the terms hereinafter set forth, with such modifications, if any, as the officers of the Borrower executing the same might determine; and

Whereas, in order to secure such bond, and the indebtedness and liabilities which may from time to time be represented thereby, and to secure the punctual repayment to the Corporation with interest of all moneys which may from time to time be loaned or advanced by it to the Borrower pursuant to or in connection with said Construction Contract or any modification thereof, the Borrower by said resolutions of its Board of Directors has determined to execute and deliver to the Corporation a mortgage in the terms of this indenture, on and of all the properties, rights and franchises hereinafter described, and by said resolutions the form of this indenture was approved and its execution and delivery were duly authorized and directed; and,

Whereas, said bond has been executed and delivered simultaneously herewith and is in substantially the following form:

United States of America,

State of Oregon.

Astoria Marine Iron Works.

First-mortgage Gold Bond.

Bond.

Know all men by these presents that for value received Astoria Marine Iron Works (herein called the Borrower), a corporation organized and existing under the laws of the State of Oregon, is held and firmly bound unto United States Shipping Board Emergency Fleet Corporation (herein called the Corporation), its successors and assigns, representing the United States of America, for the full and complete performance by the Borrower of all and singular the covenants, provisions and agreements on its part to be performed

or observed as set out in a contract numbered Fifteen, dated February 1, 1919, by and between the Borrower and the Corporation, and any modifications thereof or additions thereto which may be agreed upon in writing by and between the Borrower and the Corporation (which contract together with such modifications and/or additions is herein referred to as the "Construction Contract"), including the payment in gold coin of the United States of the present standard of weight and fineness of any sums that may be or become due from the Borrower under the Construction Contract or by reason thereof, for which performance, well and truly to be made the Borrower binds itself, its successors and assigns firmly by these presents.

Sealed with the seal of the Borrower, pursuant to the due
53 legal and corporate authority, this — day of —, 1919.

Whereas, under the Construction Contract the Corporation has agreed to make a loan to the Borrower in a sum of money not to exceed, except at the option of the Corporation, the sum of One Hundred Seventy-five Thousand (\$175,000.00) Dollars, the principal whereof is to be repaid, with interest at the rate of six per centum (6%) per annum, as in the Construction Contract provided; and

Whereas, the Construction Contract contemplates that under certain circumstances the Corporation will make advances or outlays or incur expenses in addition to the moneys to be loaned as aforesaid, and that it may suffer damage or loss in the event of a breach of the Construction Contract;

Now, therefore, the condition of this bond is that

(1) If without deduction from either principal or interest from any tax, assessment or governmental charge which the Borrower may be required or permitted to pay, or to deduct therefrom, under or by reason of any present or future law of the United States of America or of any State, county, municipality or other taxing authority therein, the Borrower shall well and truly pay unto the Corporation at the office of the Corporation in Washington, District of Columbia, or at any other place which may be hereafter designated in writing by the Corporation, all sums for which the Borrower is or may become indebted or liable to the Corporation under the Construction Contract or by reason thereof, as and when the same shall become due, by declaration or otherwise, including moneys loaned, advanced or expended, expenses incurred and loss or damages sustained by the Corporation, with interest at the rate of six per centum (6%) per annum as in the Construction Contract provided; and

(2) If the Borrower shall also well and truly perform and observe all and singular the covenants, provisions and agreements in the Construction Contract contained, on the part of the Borrower to be performed or observed, the terms and conditions of said contract being hereby referred to and made a part of this bond with like effect as if the same were herein fully set forth;

Then and in such case this bond shall be void and of no effect, otherwise to remain in full force and virtue.

This bond is issued under and secured by an indenture of mortgage of even date herewith made by the Borrower to the Corporation, to which indenture reference is hereby made, with like effect as if the same were herein fully set forth.

ASTORIA MARINE IRON WORKS,

By _____,
President.

Attest:

_____,
Secretary.

54 and

Performance of Conditions, etc.

Whereas the Borrower has duly authorized the conveyance, pledge, assignment and transfer under this indenture of the property herein specified and referred to; and

Whereas, all acts and things prescribed by law and by the charter and by-laws of the Borrower have been duly complied with in the execution of this indenture, and all things necessary to make said bond when executed by the Borrower a valid, binding and legal obligation of the Borrower, and these presents a valid indenture to secure and provided for the payment of the bond and the performance of the Construction Contract and all the other purposes herein or therein specified have been done and performed and have happened, and the execution and delivery of the said bond, and the execution, acknowledgement and delivery of this indenture have in all respects been duly authorized;

Conveyance.

Now, therefore, this indenture witnesseth: That in order to secure the payment of said bond according to its tenor, purport and effect, as well the interest as the principal thereof, and to secure the repayment of the principal and interest of all moneys which shall from time to time be or become due from the Borrower to the Corporation under or by reason of the Construction Contract, and to secure the performance and observance of all the covenants, provisions, agreements and conditions in said contract or said bond or herein contained, and for and in consideration of the premises, and of the acceptance of said bond by the Corporation, and of the sum of One Dollar to the Borrower duly paid by the Corporation representing the United States of America at or before the ensealing and delivery of this Indenture, the receipt of which is hereby acknowledged, said Astoria Marine Iron Works hath executed and delivered this Indenture, and hath granted, bargained, sold, aliened, remised, released, conveyed, confirmed, assigned, transferred and set over, and by these presents doth grant, bargain, sell, alien, remise, release, convey, confirm, assign, transfer and set over, unto United States Shipping Board Emergency Fleet Corporation representing the United States of America, its successors and assigns:

Description of Property.

First. All those tracts or parcels of ground, situate, lying and being in the County of Clatsop, in the State of Oregon, bounded and particularly described as follows:

All the riparian rights, tide lands, tide flats and privileges, water rights and wharfing easements adjacent to and in front of Lot One (1) in Section Nineteen (19) Township Eight (8) North, Range Nine (9) West of the Willamette Meridian, and also all the riparian rights, tide lands, tide flats and privileges, water rights and wharfing easements adjacent to and in front of that part of Lot Two (2) in said Section Nineteen (19) as lies east of a line drawn due north to the ship or main channel of Young's Bay from a point in the south line of said Lot Two (2) which point is half way between the east and west boundary lines of said Lot Two (2).

Second. The Marine Railway now under construction at the site above described while under construction and when completed where-soever situated, moved or transferred.

Third. The structures, buildings and equipment constituting the repair plant of the Borrower located upon the tracts or parcels of ground aforesaid, while under construction and when completed.

Fourth. All basins, all floating or other dry docks, wet docks, marine railways, wharves, piers, caissons, plants, shops, buildings, structures, super-structures, erections, fixtures and any other property, real, personal or mixed, erected or installed upon or in connection with or constituting the equipment of the tracts or parcels of land, and/or the dry docks, marine railway and repair plant described in subdivisions numbered, respectively, First, Second, Third and Fourth hereof, including, without restricting the generality of the foregoing, all boilers, pumps and pumping apparatus, pipes, tracks, rails, ties, ways, blocks, struts, pawls, tackle, guys, and other appurtenances and accessories, all stationary or locomotive engines, and all cars and other rolling stock, floating and other equipment, machinery, instruments, tools, implements, appliances, shoring and other materials, supplies, furniture and other chattels of the Borrower, whether or not affixed to the freehold for any use whatsoever.

Fifth. All riparian rights and water rights, all easements, all dockage and other contracts and contract rights, and renewals and extensions thereof, all letters patent and patent licenses, and rights, all franchises and other rights and things now owned or controlled or hereafter acquired or provided by the Borrower for use or used upon or in connection with any of the properties described in the subdivisions hereof numbered, respectively, First, Second, Third and Fourth, or in connection with any docking or marine railway business of the Borrower; and all corporate or other rights, privileges and franchises which the Borrower now has or hereafter shall acquire, possess or become entitled to for or appertaining to the con-

struction, maintenance, use or operation of floating or other dry docks, wet docks or marine railways, upon or in connection with any of the said property, or upon or in connection with any other property now or at any time hereafter subject to the lien of this Indenture.

Sixth. And also all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, tolls, charges, revenues, earnings, income, rents, issues and profits of any of the aforesaid properties or of any other premises or property at any time subject to the lien hereof; and also all the estate, rights, title, interest, property, possession, claim and demand whatsoever, as well at law as in equity, now owned or hereafter acquired by the Borrower, of, in and to said property, and every part and parcel thereof, with the appurtenances and franchises now or hereafter appertaining thereto.

Habendum.

To have and to hold said property, real, personal and mixed, rights, franchises, estates and appurtenances hereby conveyed or assigned or intended to be conveyed or assigned (hereinafter sometimes termed collectively the Mortgaged Premises), unto and to the use of the Corporation, representing the United States of America, its successors and assigns forever.

And the Borrower covenants and agrees with the Corporation, its successors and assigns, as follows:

57

Article I.

Particular Covenants of the Borrower.

Covenants of Borrower.

The Borrower particularly covenants with the Corporation as hereinafter in this Article set forth:

Payment of Bond, etc.

Section 1. The Borrower will duly and punctually pay to the Corporation at its office in Washington, D. C., or at such other place as may be designated in writing by the Corporation, the principal and interest of each and every payment to be made by the Borrower hereunder or under or by reason of the Construction Contract as and when the same shall become due by declaration or otherwise according to the true intent and meaning hereof and thereof without deduction from either principal or interest for any tax, assessment or governmental charge which the Borrower may be required or permitted to pay, or to deduct therefrom, under or by reason of any present or future law of the United States of America or of any State, County, municipality or other taxing authority

therein, and will well and truly perform all and singular the covenants, provisions and agreements on its part to be performed or observed as set out herein or in the Construction Contract.

Further Assurance.

Section 2. All property hereby conveyed, assigned or transferred, or intended to be or become subject to the lien of this indenture, shall, if not now owned by the Borrower and subject to the lien hereof, become and be subject to its lien, forthwith as and when acquired by the Borrower, and as fully and completely as if now owned by the Borrower and specifically described in the granting clauses hereof; but the Borrower will at any and all times, do, execute and deliver, or cause to be done, executed and delivered all and every such further acts, things, deeds, conveyances, transfers and assurances as the Corporation shall reasonably require for better assuring, conveying, assigning and confirming unto the Corporation all and singular the hereditaments, premises, estates and property hereby conveyed or assigned or intended to be, or which the Borrower may be or hereafter become bound to convey or assign to the Corporation.

58

Recording.

Section 3. The Borrower will, at its own expense, duly and promptly record, register, file and refile this Indenture and any and all instruments of further assurance and supplemental mortgages, both as a mortgage of real estate and as a chattel mortgage. Before or concurrently with the making of any advance under the Construction Contract, the Borrower shall pay any recording or other tax, and in all other respects comply with the law in respect to such advance and the security therefor hereunder, and shall furnish the Corporation with evidence thereof.

Removal of Dry Dock.

Section 4. The Borrower will not move the marine railway described in the Construction Contract, or permit the same to be moved, from the premises where the same shall be constructed, except immediately to the tracts or parcels of ground described in subdivision numbered First of the granting clauses hereof, or the water-front appertaining thereto. With all convenient speed the Borrower will cause said marine railway upon its completion to be removed to said tracts or parcels of ground or such appurtenant water-front, and thenceforth to be and remain securely affixed to said tracts or parcels of ground by means of stagings and substantial chains or cables, and by such other means as the Corporation shall approve or request, and will at no time cause or permit said marine railway to be thence removed without the written consent of the Corporation signed by its Director-General or one of its Vice-Presidents.

Additional Property.

Section 5. This Indenture is and always will be kept, except as herein specified, a first lien upon all that portion of the Mortgaged Premises heretofore acquired by the Borrower; and as and when the Borrower shall acquire or construct additional portions of the Mortgaged Premises, this Indenture shall be and shall always be kept a first lien upon all such property and upon all property at any time described in vouchers used for the payment and application of moneys deposited by the Corporation under the Construction Contract, or described in papers delivered by the Borrower to the Corporation in connection with such vouchers, and upon all
59 property from time to time purchased (or for the purchase of which reimbursement shall be made) with moneys so deposited. The Borrower will not voluntarily create or suffer to be created any debt, lien or charge which would be prior to the lien of this Indenture upon the Mortgaged Premises or any part thereof, or upon the income thereof; and within three months after the same shall accrue it will pay or cause to be satisfied and discharged, or will make adequate provision to satisfy and discharge, all lawful claims and demands of mechanics, laborers and others which if not paid might by law be given precedence to this Indenture as a lien or charge upon the Mortgaged Premises or any part thereof or the income thereof.

Payments of Leases, etc.

Section 6. The Borrower will punctually observe and perform all obligations and make all payments required by the terms of any lease, contract or other agreement from time to time constituting a part of the Mortgaged Premises.

Payment of Taxes, etc.

Section 7. (a) The Borrower will promptly pay and discharge or cause to be paid and discharged all taxes, assessments and charges of every name and nature, lawfully imposed or assessed upon the Borrower or its property, or upon the income or profits thereof, and all other obligations now or hereafter existing upon or in respect to the same, the lien whereof might be held to be prior or equal to the lien of these presents, so that the same shall not fall into arrears and so that the priority of the lien created by this Indenture or any instrument or indenture supplemental hereto shall be duly preserved.

(b) The Borrower will not become indebted, except for wages, salaries, taxes, supplies, rentals and other current operating expenses, and obligations incurred in the ordinary course of business, and the Borrower will not agree to any extension of the time at which any such indebtedness shall be due and payable beyond the time

when the same would be due and payable in the ordinary and usual course of business.

Section 8. In case the Borrower shall default in any of the payments referred to in subdivisions 5, 6 and 7 of this Article, and such default shall continue for a period of thirty (30) days, the Corporation may at its option itself pay and discharge the same; the amount of any such payments by the Corporation, and, at its option as provided in the Construction Contract, the amount of any other expenses paid or incurred by it thereunder, with interest thereon at the rate of six per cent (6%) per annum) shall be included in the loan secured hereby and the lien hereof;

Substituted Property.

Section 9. Any and all substitutes for any part of the Mortgaged Premises which shall from time to time be acquired or constructed in lieu of property destroyed by fire, collision or other casualty, or for the construction or acquisition of which any payments shall be made or reimbursed out of insurance moneys, shall forthwith upon such construction or acquisition become subject to the lien of this Indenture in the same manner and to the same extent as the property injured or destroyed.

Maintenance and Repairs.

Section 10. The Borrower will at all times diligently maintain, preserve and keep its corporate existence and organization and all the rights and franchises to it granted and upon it conferred, will neither commit nor suffer or permit others to commit, strip or waste any part of the Mortgaged Premises, and will at all times maintain, preserve and keep its properties included in the Mortgaged Premises and every part and parcel thereof in good repair and condition, and cause the same to be operated and kept in working order when sufficiently completed for operation, and will from time to time make all lawful and proper repairs, renewals, replacements and useful and proper alterations, additions, betterments and improvements.

Identification of —.

Section 11. All equipment (other than small tools and appliances) upon which this Indenture shall be or become a first lien, shall be marked in such manner as the Corporation may request or approve so as to distinguish the same from other equipment of the Borrower, and shall be identified as equipment subject to this Indenture, and the Borrower will at all times maintain such distinctive marks thereon, and will, in the months of December and June, in each year, furnish the Corporation a list of all such equipment as of the last day of the month then next preceding, every such list to be certified by an executive officer of the Borrower in writing, stating also that all the equipment therein listed is marked as required by this Section.

Section 12. The Borrower will with all reasonable diligence and dispatch complete the Plant as defined in the Construction Contract, in accordance with recognized standards of first-class construction, and will acquire, construct and complete such appurtenances thereto as may be necessary for the efficient operation thereof.

Completion of Plant.

Section 13. The Borrower will, at any and all reasonable times, upon the demand of the Corporation, furnish to the Corporation within ten (10) days after such demand, evidence satisfactory to the Corporation that the Borrower has done and performed or caused to be done and performed all such acts and things as are required on its part hereby or by the Construction Contract, and will likewise furnish within thirty (30) days after such demand a full and complete statement of the condition of the Borrower, including a trial balance of its accounts and affairs, and such other financial statements as may be requested by the Corporation, all of such statements and trial balances to be verified by the President or a Vice-President of the Borrower, and will permit all such books and affairs to be audited, at the expense of the Borrower, by an auditor selected by the Corporation.

Section 14. The Borrower covenants and agrees with the Corporation that the Borrower will execute and deliver, from time to time, as requested by the Corporation, such instruments of assignment or transfer and such power of attorney or other instruments as may be necessary in the aid of any action or proceedings taken or contemplated by the Corporation consequent upon any default by the Borrower.

Section 15. The Borrower will place and maintain insurance upon the Mortgaged Premises as in Article V of the Construction Contract provided; the original policies of insurance to be deposited with the Corporation, and to provide that the loss, if any,
62 shall be paid to the Corporation in trust for the Corporation and the Borrower, as their interests may appear.

Title.

Section 16. The Borrower further covenants that the Mortgaged Premises and all parts thereof are free and clear of all liens of every nature having priority, or which may become entitled to priority over these presents, except as hereinbefore specified. And that the Borrower has good title to and full power and authority to sell and convey the property hereby conveyed or purporting to be conveyed, except as hereinbefore specified, and that it will warrant and defend the lien and interest of the Corporation in said property against the lawful claims of every person and all persons claiming or to claim the same, except as hereinbefore specified. And that it will not suffer any liens, superior or equal to the lien hereof, to attach to the Mortgaged Premises.

Section 17. The Borrower will exercise all lawful powers which it may possess to carry out and perform the foregoing covenants and agreements.

Article II.

Remedies.

Events in which Security Enforceable. Corporation May Enter. Application of Earnings.

Section 1. In case one or more of the events described in subdivisions (a) to (h) of Section (4) of Article III of the Constitution Contract shall happen, and (except in the case of the event described in subdivision (c) thereof) shall continue for a period of fifteen (15) days after the Corporation shall have given notice in writing thereof to the Borrower; or in case default shall be made by the Borrower in the payment to the Corporation of any instalment of interest or principal in respect of advances made, or of sums otherwise due, under or by reason of said contract, when and as such the same shall become due and payable, either by the terms thereof or otherwise, as therein or herein provided; or in case default shall otherwise be made by the Borrower in respect of any covenant, condition or provision of this Indenture, or of the Construction Contract, and such default shall continue as aforesaid; then, and in each and every such case, the Corporation, in its discretion, may declare the whole of the unpaid principal and interest of the loan secured hereby immediately due and payable (and the same shall forthwith be and become due and payable) and/or personally or by its agents or attorneys, may enter into and upon all or any part of the Mortgaged Premises, and may wholly exclude the Borrower and its agents and servants therefrom, and having and holding the same may use, operate, manage and control the Mortgaged Premises, and regulate, so far as permitted by law, the charges and compensation for the use of any or all of the facilities comprised in the Mortgaged Premises, and may conduct the business thereof either personally or by its superintendents, managers, receivers, agents and servants or attorneys; and upon every such entry the Corporation, at the expense of the Mortgaged Premises, and in the same manner and to the same extent as is usual with companies engaged in like business to that of the Borrower, may from time to time maintain and restore, either by purchase, repairs or construction, and may insure or keep insured, the Plant as defined in the Construction Contract, and the equipment, tools and machinery and other property comprised in the Mortgaged Premises, including buildings, structures and other fixtures erected or provided for use in connection with said Plant or with any other property included in the Mortgaged Premises, whereof it shall become possessed as aforesaid; and likewise, from time to time, at the expense of the Mortgaged Premises, the Corporation may make all necessary or proper repairs, renewals, replacements, alterations, betterments and improvements thereof and additions thereto as to it

may seem judicious; and in such case the Corporation shall have the right to manage the Mortgaged Premises, and to carry on the business and exercise all rights and powers of the Borrower in connection therewith, either in the name of the Borrower or otherwise, as the Corporation shall deem best. And the Corporation shall be entitled to collect and receive all dockage and other charges, earnings, income, rents, issues and profits of the same and every part thereof, and after deducting the expenses of operating said

64 Plant and other premises, and of conducting the business thereof and the expenses of all repairs, maintenance, renewals, replacements, alterations, additions, betterments and improvements, and all payments which may be made for taxes, assessments, insurance and prior or other proper charges upon the Mortgaged Premises or any part thereof, as well as just and reasonable compensation for its own services, and for all counsel, agents, clerks, servants and other employees by it properly engaged and employed, the Corporation shall apply the moneys arising as aforesaid, as follows:

First. In case none of the instalments of principal upon the loan or other advances made under the Construction Contract shall then be due, to the payment of the interest in default, with interest thereon at the rate of six per cent per annum;

Second. In case all the instalments of principal of such loan or other advances shall have become due by declaration or otherwise, first to the payment of the accrued interest, with interest thereon at the rate of six per cent per annum, and then to the payment of the principal of such loan and other advances and/or sums due hereunder or under or by reason of the Construction Contract.

Section 2. In case one or more of the events or defaults specified in Section 1 of this Article shall have happened, and shall have continued for the period of grace, if any, therein specified in respect thereof, the Corporation may in its discretion declare the whole of the unpaid principal and interest of the loan immediately due and payable (and the same shall forthwith be and become due and payable) and/or with or without entry, may, personally, or by attorney, in its discretion, either

Sale.

(a) Sell, subject to the liens, if any, then existing thereon, to the highest and best bidder, all and singular the Mortgaged Premises, including all franchises and other rights and all appurtenances and other real and personal property of every kind, and all the Borrower's right, title and interest, claim and demand therein, and right of redemption thereof, which sale or sales shall be made at public

65 auction at such place in the City of Astoria, in the State of Oregon, or at such other place, and at such time and upon such terms, as the Corporation may fix and briefly specify in the notice of sale to be given as herein provided, or as may be required by law; or

Other Rights of Foreclosure.

(b) Proceed to protect and enforce its rights under the Construction Contract and this indenture by a suit or suits in equity or at law, whether for the specific performance of any covenant or agreement contained therein or herein, or in aid of the execution of any power therein or herein granted, or for any foreclosure of this indenture, or for the enforcement of any other legal or equitable remedy.

Sale as Entirety.

Section 3. In the event of any sale, whether made under the power of sale herein granted and conferred or under or by virtue of judicial proceedings, the whole of the Mortgaged Premises shall be sold in one parcel and as an entirety, unless the Corporation shall elect that the Mortgaged Premises be sold in parcels (in which case the sale shall be made in such parcels as may be specified by the Corporation), or unless such sale as an entirety is impracticable by reason of some statute or other cause.

Waiver of Right of Marshalling.

The Borrower, for itself and all persons hereafter claiming through or under it, or who may at any time hereafter become holders of liens junior to the lien of this indenture, hereby expressly waives and releases all right to have the Mortgaged Premises marshalled upon any foreclosure or other enforcement hereof, and the Corporation or any court in which the foreclosure of this indenture or enforcement of the rights hereby created is sought, shall have the right to sell the entire property of every description subject to the lien of this indenture, as a whole and in a single lot, or in such parcels as may be specified by election of the Corporation as aforesaid.

Notice of Sale.

Section 4. Notice of any sale pursuant to any provision of this indenture, shall state the time when and place where the same is to be made, and shall contain a brief general description of the property to be sold, and shall be sufficiently given if published once in each week for four successive weeks prior to such sale, in one newspaper published in Astoria, in the State of Oregon, and in
66 such other manner as may be required by law.

Adjournment.

Section 5. The Corporation may adjourn from time to time any sale by it to be made under the provisions of this indenture, by announcement at the time and place appointed for such sale, or for such adjourned sale or sales; and without further notice or publication it

may make such sale at the time and place to which the same shall be so adjourned.

Deeds of Conveyance. Deed by Borrower.

Section 6. In case of the sale of any of the mortgaged property, the Corporation may transfer and deliver to the accepted purchaser or purchasers the property so sold and may execute and deliver in the name of the Borrower such bills of sale, assignments, or other instruments of transfer and assignments of policies or insurance as may be necessary or proper to vest title in such purchaser or purchasers, and such transfer and delivery shall be conclusive evidence of the validity of such sale and of the title of the purchaser acquired thereby. The Corporation is hereby appointed the true and lawful attorney irrevocable of the Borrower in its name and stead to make all necessary assignments, transfers and deliveries of the property so sold, and for that purpose it may execute all necessary acts of assignment and transfer and may substitute one or more persons with like power, the Borrower hereby ratifying and confirming all that its said attorney or substitutes shall lawfully do by virtue hereof. Nevertheless the Borrower, if so requested by the Corporation, shall join in the execution of such conveyances, assignments and transfers and/or execute such separate documents as the Corporation may require.

Any sale or sales made under this indenture, whether under the power of sale herein conferred, or under or by virtue of judicial proceedings, shall operate to divest all right, title, interest, claim and demand whatsoever, of the Borrower, either in law or in equity, of, in and to the premises and property so sold, and shall be a perpetual bar both at law and in equity against the Borrower, its successors and assigns, and against any and all persons claiming or to claim the premises and property sold or any part thereof,
 67 from, through or under the Borrower, its successors or assigns

Fixtures.

The personal property and chattels conveyed or intended to be conveyed by or pursuant to this indenture shall be deemed real estate for all the purposes of this indenture, and shall be held and taken to be fixtures and appurtenances of the Mortgaged Premises and part thereof, and are to be used and sold therewith and not separate therefrom, except as herein or in the Construction Contract otherwise provided.

Protection of Purchasers.

Section 7. The receipt of the Corporation for the purchase money paid at any such sale shall be a sufficient discharge therefor to any purchaser of the property or of any part thereof, sold as aforesaid; and no such purchaser or his representatives, grantees or assigns, after paying such purchase money and receiving such receipt, shall be bound to see to the application of such purchase money upon or

for any trust or purpose of this indenture, or in any manner whatsoever be answerable for any loss, misapplication or non-application of any such purchase money, or any part thereof, or be bound to inquire as to the authorization, necessity, expediency or regularity of any such sale.

Application of Proceeds.

Section 8. The proceeds of any such sale, whether made under the power hereby conferred or pursuant to judicial proceedings, together with any other sums which then may be held by the Corporation under any of the provisions of this indenture as part of the Mortgaged Premises or the proceeds thereof, shall be applied as follows:

First. To the payment of the costs and expenses of such sale, including a reasonable compensation to the Corporation, its agents, attorneys and counsel, and of all expenses, liability and advances made or incurred by the Corporation, and to the payment of all taxes, assessments, liens or other charges superior to the lien of this indenture, except any superior taxes, assessments, liens or other charges, subject to which the property shall be sold;

Second. To the payment of the whole amount then owing or unpaid by the Borrower hereunder or under or by reason of the Construction Contract, for principal and interest or otherwise, with interest on the overdue instalments of interest at the rate of six per cent per annum; and

68 Third. To the payment of the surplus, if any, to the Borrower, or to whomsoever may be lawfully entitled to receive the same, or as a court of competent jurisdiction may direct.

Corporation May Purchase.

Section 9. Upon any such sale by the Corporation or pursuant to judicial proceedings the Corporation or its nominees may become the purchaser or purchasers, and for or in settlement or payment of the purchase price of the property purchased, shall be entitled to use and apply the bond secured hereby by presenting the same in order that there may be credited thereon the sums applicable to the payment thereof out of the net proceeds of such sale; and thereupon such purchaser or purchasers shall be credited on account of such purchase price with the portions of such net proceeds that shall be applicable to the payment of and shall have been so credited upon said bond; and upon compliance with the terms of such sale the Corporation or its nominees purchasing as aforesaid may hold, retain and dispose of such property without further accountability.

Deficiency Judgment.

Section 10. The Corporation shall be entitled to recover judgment for the principal and interest of all advances upon or represented

by said bond, and for any other claims secured hereby, or by the Construction Contract, either before or after or during the pendency of any proceedings for the enforcement of the Construction Contract or of the lien of this indenture; and the right of the Corporation to recover such judgment shall not be affected by any entry or sale hereunder, nor by the exercise of any other right, power or remedy for the enforcement of the provisions of this indenture or of said contract or for the foreclosure of the lien hereof; and in case of sale of the property subject to this indenture and of the application of the proceeds of sale to the payment of the bond hereby secured, the Corporation shall be entitled to enforce payment of and to receive all amounts then remaining due and unpaid upon said bond, and shall be entitled to recover judgment for any portion of such amount remaining unpaid, with interest. No recovery of any such judgment by the Corporation, and no levy of any execution under any such

69 judgment upon property subject to this indenture, or upon any other property, shall in any manner or to any extent affect the lien of this indenture upon the property or any part of the property subject to this indenture, or affect any lien, rights, powers or remedies of the Corporation hereunder or under said contract, but such lien, rights, powers and remedies shall continue unimpaired as before. Any moneys collected by the Corporation pursuant to the provisions of this paragraph (less expense, indemnification and other proper deductions) shall be applied by the Corporation as provided in paragraph numbered Second of Section 8 of the Article.

Waiver of Stay and Extension Laws.

Section 11. The Borrower will not at any time insist upon or plead or in any manner whatever claim or take the benefit or advantage of any stay or extension law now or at any time hereafter in force, nor will it claim, take or insist upon any benefit or advantage from any law now or hereafter in force providing for the valuation or appraisal of the property or any part of the property subject to this indenture prior to any sale or sales thereof, whether made pursuant to any provision herein contained, or to any decree, judgment or order of any court of competent jurisdiction; nor will it after any such sale or sales claim or exercise any right under any statute enacted by the United States or by any State or otherwise, to redeem the property so sold or any part thereof; and the Borrower hereby expressly waives all benefit and advantage of any such law or laws, and covenants that it will not hinder, delay or impede the execution of any power herein granted or delegated to the Corporation, but that it will suffer and permit the execution of every such power as though no such law or laws had been made or enacted.

Right of Entry. Appointment of Receiver.

Section 12. Upon the filing of a bill in equity or upon the commencement of any other judicial proceeding to enforce any right of the Corporation under the Construction Contract or this indenture

the Corporation shall be entitled to exercise the rights of entry conferred herein and in said contract, and also any and all other rights and powers therein or herein conferred and provided to be exercised by the Corporation upon the happening of an event or default specified in Section 1 of this Article, and upon the continuation thereof for the period of grace, if any, therein specified in respect thereof; and the Corporation shall be entitled, as a matter of right, to the appointment ex parte and without notice of a receiver of the premises and property subject to this indenture, and of the earnings, income, rents, revenues, issues and profits thereof, with such powers as the court making such appointment shall confer; but notwithstanding the appointment of any receiver, the Corporation shall continue to be entitled as pledgee and otherwise to retain in its discretion the possession and control of any property then held by it hereunder.

Remedies Cumulative.

Section 13. Except as in the Construction Contract or herein expressly provided to the contrary, no remedy therein or herein conferred upon or reserved to the Corporation is intended to be exclusive of any other remedy, but each and every such remedy shall be cumulative, and shall be in addition to every other remedy given thereunder or hereunder, or now or hereafter existing at law or in equity or by statute.

Delay or Omission to Exercise Rights Not to Constitute a Waiver.

Section 14. No delay or omission of the Corporation to exercise any right or power accruing upon any default or other event, occurring or continuing as aforesaid shall impair any such right or power, or shall be construed to be a waiver of any default or an acquiescence therein; and every power and remedy given to the Corporation by the Construction Contract or this indenture may be exercised by the Corporation from time to time and as often as may be deemed by it expedient.

Waiver of Default.

Section 15. In case at any time the Corporation shall have declared immediately due and payable the whole of the unpaid principal and interest of the loan and any other advance and/or sums mentioned in the Construction Contract, the Corporation may at any time thereafter, by written notice to the Borrower, waive any or all default hereunder and their consequences, including the acceleration of maturity of principal or interest or both; but no such waiver shall extend to or effect any subsequent default or other event, or impair any right consequent thereon.

Restoration to Former Position.

Section 16. In case the Corporation shall have proceeded to enforce any right under the Construction Contract or this indenture

by foreclosure, entry or otherwise, and such proceedings shall have been discontinued or abandoned because of waiver or for any other reason, or shall have been determined adversely to the Corporation, then and in every such case the Borrower and the Corporation shall severally and respectively be restored to their former position and rights hereunder in respect of the Mortgaged Premises, and all rights, remedies and powers of the Corporation shall continue as though no such proceedings had been take.

Article Three.

Possession until Default—Defeasance—Release—Insurance.

Borrower to Retain Control until Default.

Section 1. Subject to the provisions of the Construction Contract, and particularly of Article VI thereof, so long as no default shall be made by the Borrower in the faithful performance of said contract, or in the payment of the principal and interest of advances made thereunder or under said bond, whether by way of loan or otherwise, or in the due observance or performance of any of the covenants, agreements or conditions in said contract or in this indenture or in said bond contained to be observed or performed by the Borrower, the Borrower shall be permitted under the conditions herein and in said contract and bond contained to retain the possession, operation, enjoyment and control of the Mortgaged Premises and all and singular the rights and franchises thereunto belonging, and to receive, take and use the tolls, earnings, income, rents, revenues and profits thereof.

Discharge of Mortgage Upon Payment of Bond, etc.

Section 2. If when all the advances under the Construction Contract whether by way of loan or otherwise, shall have become due and repayable, the Borrower shall well and truly pay or cause to be paid the whole amount of the principal and interest due thereon, and shall also pay or cause to be paid all other sums payable under or by reason of said contract or under this indenture by the Borrower, and shall well and truly keep and perform all the things herein required to be kept and performed by it, according to the true intent and meaning of said contract, and of this indenture, then and

72 in that case all property, rights and interests hereby conveyed or assigned or pledged shall revert to the Borrower, and the estate, right, title and interest of the Corporation shall thereupon cease, determine and become void, and the Corporation shall in such case, on demand of the Borrower and at its cost and expense, enter satisfaction of this indenture upon the records, and shall assign and transfer, or cause to be assigned and transferred, and shall deliver or cause to be delivered, to the Borrower all personal property then held by the Corporation hereunder, otherwise this indenture shall be, continue and remain in full force and virtue.

Alterations of Improvements, etc. Sale of Machinery, Supplies, etc.
Substituted Property.

Section 3. The Borrower, while in possession of the Mortgaged Premises, may from time to time, with the written approval of the Corporation, alter the improvements upon the Mortgaged Premises for the better accommodation of the Borrower's business, and make such reasonable alterations and substitutions in the Mortgaged Premises generally, not affecting its general design, as the Corporation may in writing approve; and, anything in this indenture notwithstanding, the Borrower may, subject to the approval of the Corporation, sell, exchange or otherwise dispose of any such apparatus, machinery, equipment or materials of a movable or a consumable nature (other than the Marine Railway described in the Construction Contract), at any time held or acquired for use in connection with its plant, as may have become unfit for use or as may be unnecessary or undesirable for the purpose of its business there to be carried on in accordance with said contract, provided that the same shall be renewed and replaced, or that in substitution therefor other property of equal or greater value shall be acquired, and that such renewals, replacements or substitutions shall be free from liens and subjected to this indenture by a lien equal or superior in rank to the lien theretofore enjoyed by this indenture upon the property so sold, exchanged or disposed of, so that the value of the security hereunder shall remain unimpaired; and all property acquired for the purpose of such renewal, replacement or substitution, or acquired by such exchange or by the proceeds of such sale or other disposition of property, shall immediately and without any other act or conveyance on the part of the Borrower be and become subject to the operation and lien of this Indenture, with like effect as if the same were expressly and specifically described in the granting clauses of this Indenture.

Proceeds of Insurance.

Section 4. The proceeds of any insurance collected with respect to the Mortgaged Premises shall be held and applied by the Corporation as follows:

(a) In case the loan or any part of it shall then or thereupon be or become due under any of the provisions hereof, or of the Construction Contract, such proceeds shall, at the option of the Corporation, be applied to the payment of the principal and interest of said loan or such part thereof as shall then be due and payable.

(b) The proceeds not required to pay any part of the loan that may then be due shall (until the moneys loaned by the Corporation shall have been fully repaid) be deposited as directed by the Corporation, and be expended by the Borrower for the repair or reconstruction of the Plant, or to reimburse the Borrower for expenditures

made by it for such purposes after the occurrence of the contingency insured against, as in said contract provided.

(c) When all sums due to the Corporation hereunder, or under or by reason of the construction Contract have been repaid, the proceeds remaining thereafter shall be paid to the Borrower.

Section 5. A bridge of approximately twenty-four (24) feet in width has been erected and is now maintained by the County of Clatsop across the above described premises. It is contemplated that the said bridge will be replaced by a new and wider bridge, to be constructed jointly by the County and the Port of Astoria, and in the event of such construction, it is proposed that the Borrower dedicate to the public for the said bridge, a strip or parcel of land fifty (50) feet in width across the said premises, said strip or parcel to be in approximately the same location as the present bridge and in the event the Borrower dedicates said strip or parcel under the conditions above mentioned, the Corporation agrees to release said strip or parcel so dedicated from the lien of this mortgage.

Article Four.

Sundry Provisions.

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Successors and Assigns.

Section 1. All the covenants, stipulations, premises and agreements in this Indenture contained by or on behalf of the respective parties hereto shall bind and enure to the benefits of their respective successors and assigns, whether so expressed or not. Except as otherwise provided in this Indenture, the term "Borrower" includes and means not only the party of the first part hereto, but also any corporation which shall have become its lawful successor with the approval of the Corporation.

Indenture for Exclusive Benefit of Parties.

Section 2. Nothing in this Indenture or in said bond contained is intended or shall be construed to give to any person, firm or corporation other than the parties hereto any legal or equitable right, remedy or claim under or in respect of the Construction Contract, said bond or this Indenture or any covenant, provision or conditions therein or herein contained, all the covenants, provisions and conditions therein and herein contained being, and being intended to be for the sole and exclusive benefit of the parties hereto.

Counterpart Originals.

Section 3. In order to facilitate the recording of this Indenture the same may be simultaneously executed in several original counterparts, all of which or any one thereof shall be deemed to constitute but one and the same instrument.

Service of Notice.

Section 4. Every provision for notice and demand or request to the Borrower contained herein shall be deemed fulfilled by written notice and demand or request personally served on one or more of the officers of the Borrower or sent by registered mail directed to such officer or officers or to the Borrower at his, their, or its address to the Corporation last known.

Office of Corporation.

The principal office of United States Shipping Board Emergency Fleet Corporation (the Corporation), is number 1319 F Street, N. W. Washington, District of Columbia.

The amount which at the time of execution and delivery hereof has been advanced by the Corporation hereunder is — Dollars (\$—).

75 In witness whereof, the Astoria Marine Iron Works has caused these presents to be executed in its name in duplicate, by its President and Secretary thereunto duly authorized, and its corporate seal to be hereto affixed and attached as of the day and year first above written.

ASTORIA MARINE IRON WORKS,

By ————, *President;*

By ————, *Secretary.*

Signed, sealed and delivered in the presence of us as witnesses:

STATE OF OREGON,

County of Clatsop, ss:

On this — day of —, A. D. 1919, before me, the undersigned, a Notary Public in and for the State of Oregon, personally appeared W. A. Viggers and Thomas Bilyeu, both to me personally known to be, respectively, the President and Secretary of the Astoria Marine Iron Works, the Corporation that executed the within and foregoing instrument, and each acknowledged the said instrument to be the free and voluntary act and deed of said corporation for the uses and purposes therein mentioned, and on oath each stated that he was authorized to execute said instrument, and that the seal affixed is the corporate seal of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year first above written.

Notary Public for Oregon,
Residing at Astoria, Oregon.

My commission expires — —, —.

"Endorsed:" Filed August 31, 1920. Jos. W. Beveridge, Clerk
J. W. Gantenbein, Deputy.

76 And there was duly filed in said Court, with the said Transcript of record an order of the Circuit Court of the State of Oregon for Multnomah County, removing said cause to the District Court of the United States for the District of Oregon, in words and figures as follows, to wit:

77 Be it remembered, That at a regular term of the Circuit Court of the State of Oregon, for the county of Multnomah begun and held at the County Court House in the City of Portland in said County and State, on Tuesday, the 7th day of September, A. D. 1920, the same being the first Tuesday in said month, and the time fixed by law for holding a regular term of said court.

Present, Hons. John P. Kavanaugh, Robert G. Morrow, Robert Tucker, G. W. Stapleton, William N. Gatens, John McCourt, and George Tazwell, Judges.

Whereupon, on this Thursday, the 23d day of September, A. D. 1920, the same being the 15th Judicial day of said term of said court, among other proceedings the following was had, to-wit:

In the Circuit Court of the State of Oregon for the County of Multnomah.

H 2410.

ASTORIA MARINE IRON WORKS, a Corporation, Plaintiff,

v.

UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION
a Corporation, Defendant.

Order Removal.

This cause coming on to be heard on the petition for the removal of the cause to the United States District Court for the District of Oregon, and the notice and bond for such removal, together with the objections of the plaintiff to the petition for removal and the court having heard arguments of counsel for both parties, and being fully advised, it is now,

Considered, ordered, and adjudged that said petition, notice, and bond for removal be and the same are hereby accepted and
78 that this cause be and the same is hereby removed to the District Court of the United States for the District of Oregon and that the clerk of this court be and he is hereby directed to prepare a transcript of the record of this cause for filing in said United

States District Court within the time allowed by law, and that this court proceed no further with this cause.

Dated September 23, 1920.

J. P. KAVANAUGH,
Judge.

Transcript of Record on Removal.

Filed in the District Court of the United States for the District of Oregon, October 16, 1920.

G. H. MARSH,
Clerk.

79 And afterwards, to wit, on the 15th day of November 1920, there was duly filed in said Court, a Demurrer to complaint, in words and figures as follows, to wit:

80 In the District Court of the United States for the District of Oregon.

ASTORIA MARINE IRON WORKS, a Corporation, Plaintiff,

vs.

UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION,
a Corporation, Defendant.

Demurrer.

Comes now the defendant and demurs to the complaint herein and to the first, second and third causes of action alleged in said complaint and each of them, upon the ground that facts sufficient to constitute a cause of action against said defendant are not alleged in said complaint, or in any one of the causes of action therein set forth, and for the further reason that it appears on the face of said complaint, that the above entitled court and the Circuit Court of the State of Oregon for the County of Multnomah, have no jurisdiction to entertain this action against said defendant.

HALL S. LUSK,
Asst. U. S. Attorney;
MACCORMAC SNOW,
Attorneys for Defendant.

DISTRICT OF OREGON, ss:

I, MacCormac Snow, being one of the attorneys for the defendant herein, do hereby certify that in my opinion the foregoing demurrer is well founded in law and I further certify that the arguments to be insisted upon by the defendant on said demurrer are as follows

1. It appears from the face of the complaint herein that plaintiff failed to comply with the contract upon which this suit is brought in

81 not furnishing plans and specifications as required in said contract, in not depositing in a bank or trust company as provided in said contract, the sum thus provided, and in not executing and delivering to defendant a bond and mortgage as provided in said contract. Said complaint and no cause of action therein set forth contains allegations sufficient to justify the said failures by plaintiff.

2. The defendant is in effect an arm, branch or department of the United States of America and the suit or action against said defendant is in effect a suit or action against the United States.

3. This action being one in effect against the United States, was commenced wrongfully in the Circuit Court of the State of Oregon for the County of Multnomah and could not be maintained therein and therefore cannot be maintained in this court after being removed hereto.

4. The amount in dispute in this action exceeds \$10,000.00 and, therefore, the above entitled court cannot take jurisdiction of the action.

MACCORMAC SNOW,
Of Attorneys for Defendant.

Due and sufficient service by copy of the foregoing demurrer is acknowledged this 15th day of November, 1920.

L. A. LILJEQVIST,
Of Attorneys for Plaintiff.

Filed November 15, 1920.

G. H. MARSH,
Clerk.

82 And afterwards, to wit, on Monday, the 14th day of February, 1921, the same being the 89th Judicial day of the Regular November Term of said Court; present the Honorable Charles E. Wolverton United States District Judge, presiding, the following proceedings were had in said cause, to wit:

83 In the District Court of the United States for the District of Oregon.

No. L-8687.

ASTORIA MARINE IRON WORKS

v.

UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION.

February 14, 1921.

This cause was heard by the court upon the demurrer to the complaint heretofore filed herein, plaintiff appearing by Mr. L. A. Liljeqvist, of counsel, and defendant by Mr. MacCormac Snow, of

counsel, and Mr. Hall S. Lusk, Assistant United States Attorney. Upon consideration whereof, it is ordered that said demurrer be and the same is hereby sustained.

84 And afterwards, to wit, on the 14th day of February 1921 there was duly filed in said Court, an Opinion on Demurrer to complaint in words and figures as follows, to wit:

85 In the District Court of the United States for the District of Oregon.

No. L-8687.

ASTORIA MARINE IRON WORKS, a Corporation, Plaintiff,

v.

UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION,
a Corporation, Defendant.

February 14, 1921.

Cake & Cake and L. A. Liljeqvist, for plaintiff.

Lester W. Humphreys, United States Attorney; Hall S. Lusk, Assistant United States Attorney, MacCormac Snow, for defendant.

WOLVERTON, *District Judge*:

This is an action to recover against the United States Shipping Board Emergency Fleet Corporation for an alleged breach on the part of the Fleet Corporation of a contract theretofore entered into by and between the parties, whereby the plaintiff, in consideration of the observance of certain conditions and stipulations made and subscribed on the part of defendant, agreed to maintain a suitable site at Astoria, Oregon, and to construct a marine railway of a lifting capacity of 4,000 tons, and a repair plant, and to install them upon the site, with all necessary power, heat, lighting, sanitary and other accessories and facilities, with the privilege on the part of the Fleet Corporation of taking over the title to the plant and all the materials and equipment therefor.

The cause comes here on removal from the state court, and a motion to remand is submitted on the part of plaintiff, and on the part of defendant a demurrer to the several causes of action.

86 The motion to remand will be denied on the authority of Rosenberg Iron and Metal Co. v. U. S. Shipping Board Emergency Fleet Corporation, recently decided by this court.

The demurrer presents the question whether the Fleet Corporation is subject to be sued in this court, the amount in controversy being in excess of \$10,000. It is insisted that the Fleet Corporation is a government utility, exercising limited powers of sovereignty, and that the cause here sought to be maintained is a claim against the government which can be proceeded with for recovery only in the Court of Claims.

That the Shipping Board is a governmental agency, endowed with certain defined governmental powers, cannot be questioned. This board, by section 11 of the act of September 7, 1916 (39 Stat. 728) is authorized, when in its judgment such action is necessary to carry out the purposes of the act, to form one or more corporations under the laws of the District of Columbia, for the purchase, construction, equipment, lease, charter, maintenance, and operation of merchant vessels in the commerce of the United States. The capital stock is limited to \$50,000,000, for which the board is authorized to subscribe not less than a majority. At no time shall it be a minority stockholder. A corporation so formed is limited in the period of its existence to five years from the conclusion of the present war. Provision is made for taking over by the board all stock owned by others at the time of dissolution, to be paid for out of the funds to its credit, and for covering into the board the proceeds of the sale of bonds, charters, leases of vessels, all sales of stock made by the board, and all moneys received from any source.

87 In pursuance of the powers bestowed by section 11, the Shipping Board caused to be organized (April 13, 1917) the corporation known as the United States Shipping Board Emergency Fleet Corporation, with \$50,000,000 capital stock, all owned by the United States. It was officered by the commissioners of the Shipping Board and their nominees, and was but an operating agency of the board. The *Lake Monroe*, 250 U. S. 246, 251, 252.

The corporation, as its name implies, was created to meet emergencies arising purely out of war conditions, and for governmental purposes, to enable the government to cope successfully with the exigencies incident to war. Congress has continuously so treated it.

By the act of July 1, 1918, section 8146fff, it authorized and directed the Secretary of the Treasury to cause an audit to be made of the financial transactions of the Fleet Corporation, under such rules and regulations as he should prescribe.

By the act of March 1, 1918, 40 Stat. 438, Congress authorized the corporation, within the limits of \$50,000,000, to purchase, lease, requisition for temporary use, or acquire by condemnation or otherwise, land or any interest therein suitable for construction thereon of houses for the use of employees, etc., and to make just compensation therefor in such amounts as it might determine; provided that, if the amount so determined was unsatisfactory, the corporation should pay seventy-five per cent thereof, and the claimant would thereupon be entitled to sue the United States to recover such further sum as would be required to equal just compensation for the property or interest therein so taken, in the manner provided

88 by section 24, paragraph 20, and section 145 of the Judicial Code. This act further requires the Fleet Corporation to report to Congress each year the names of all persons and corporations with whom it has made contracts and of such subcontractors as may have been employed in furtherance of the act.

By the act of June 15, 1917, 40 Stat. 182, the President is authorized to do many things touching the requisition of ships plants, etc., and, among other things, it is provided that the President may exer-

cise the power and authority thus vested in him to expend the moneys appropriated, through such exigencies as he may determine from time to time: "Provided, that all money turned over to the United States Shipping Board Emergency Fleet Corporation may be expended as other moneys of said corporation are now expended." By this piece of legislation the President may determine the amount to be paid for the property requisitioned, which, if not satisfactory, will authorize the owner to sue the United States as provided in the last act above noticed. Such authority to sue the United States is contained in the amendatory act of July 18, 1918, 40 Stat. 913, 915, extending the powers of the President.

These specific authorizations to sue the United States, I regard as designed by Congress as exceptions to the general rule that the United States cannot be sued except by its own consent.

The act of October 6, 1917, 40 Stat. 384, declares that the corporation shall be considered as a government establishment within the purview of section 5 of the act inhibiting the transfer of employees from one department to another.

There would seem to be a legislative purpose in requiring the Fleet Corporation to be incorporated under the laws of the District of Columbia, which municipality is a mere agency of the general government, the sovereign powers of which are lodged in the government of the United States. *Metropolitan Railroad Company v. District of Columbia*, 132 U. S. 1.

The fact that the Fleet Corporation is accorded the power to sue and be sued, to my mind does not affect the question, as it has access to the courts for the enforcement of all claims not in excess of \$10,000, and to the Court of Claims involving amounts in excess of that sum.

Another incident that appeals for consideration is, that by section 9 of the original act of September 7, 1916, vessels while employed solely as merchant vessels are subjected to all laws, regulations and liabilities governing merchant vessels, whether the United States be interested in them or not, and thus are subjected to the ordinary remedy of libel in rem in admiralty. This denotes an exception to the general intendment of Congress that other vessels shall not be so dealt with.

So we find that the public acts of Congress, wherever dealing with the Shipping Board and the Fleet Corporation, have seemed to recognize the condition that the Fleet Corporation is a government agency, organized for government purposes, and within its limitations to exercise the sovereign powers of the United States.

The Supreme Court, in so far as it has spoken respecting the Fleet Corporation, has recognized it as "an arm of the Board." Its language is as follows:

"But at the time of the emergency provision of June 15, 1917, the Shipping Board had been established as a public commission, with broad administrative powers, and subject to definite restrictions, and the Fleet Corporation had been created as its agency, financed with public funds. The emergency shipping legislation evidently

was enacted in the expectation that the President would employ the Shipping Board and the Fleet Corporation as its agencies to exercise the new powers, for the Fleet Corporation was mentioned in the act, and it was known to be but an arm of the Board."

The Lake Monroe, *supra*.

If an arm of the Board, it is likewise an arm of the government, for doing the things in behalf of the government assigned to it. It is in no sense a private corporation, but is a purely government organization, to meet war emergencies, and while so acting, exercises the functions of the sovereign state. True, private parties may hold stock in the entity, but the control is lodged absolutely in the government, through its officers and agents.

I am impelled to the conclusion that the Fleet Corporation is a governmental entity, created to exercise governmental functions within its restricted limitations, and that for its acts performed in that capacity the United States is not suable, except in the Court of Claims, involving an amount in excess of \$10,000. *Sloan Shipyards Corp. v. U. S. Shipping Board*, 268 Fed. 624.

Neither *United States v. Strang, et al.*, Supreme Court Dec., Advance Sheet No. 206, October Term, 1920, nor *Sales v. United States*, 234 Fed. 842, is opposed to this view. The former case must be read in view of section 41 of the Criminal Code; the court holding that the defendants were not agents of the United States within the true intendment of that section. In the latter case the court exonerated the accused because the United States was then engaging in a commercial business, and not in its sovereign capacity.

I am aware that other District Courts are not in accord with this conclusion, but I am unable to agree with them.

Demurrer sustained.

Filed February 14, 1921.

G. H. MARSH,
Clerk.

91 And afterwards, to wit, on Friday, the 1st day of April, 1921, the same being the 23rd Judicial day of the Regular March Term of said Court; present the Honorable Charles E. Wolverton, United States District Judge, presiding, the following proceedings were had in said cause, to wit:

92 In the District Court of the United States for the District of Oregon.

No. L-8687.

ASTORIA MARINE IRON WORKS, a Corporation, Plaintiff,

v.

UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION,
a Corporation, Defendant.

Order of Dismissal.

Now at this time comes the above named defendant, United States Shipping Board Emergency Fleet Corporation, a corporation, by Hall S. Lusk, Assistant United States Attorney, and moves the court for an order dismissing the above entitled action.

And it appearing to the court that an order has heretofore been made and entered herein sustaining a demurrer to the plaintiff's complaint, on the ground that this court has no jurisdiction to entertain this action for the reason that the defendant is a governmental entity, created to exercise governmental functions within its restricted limitations, and that for its acts performed in that capacity, the United States is not suable, except in the Court of Claims, involving an amount in excess of \$10,000.00,

And it further appearing that the plaintiff appearing in open court by its attorney, L. A. Liljeqvist, has declined to amend its complaint or plead further herein,

It is now therefore considered, ordered, and adjudged that the said action be and it is hereby dismissed for want of jurisdiction and that defendant have judgment for its costs and disbursements herein.

Dated at Portland, Oregon, this 1st day of April, 1921.

CHAS. E. WOLVERTON,

Judge.

Filed April 1, 1921.

G. H. MARSH, *Clerk.*

93 And afterwards, to wit, on the 27th day of April, 1921, there was duly filed in said Court, a Petition for Writ of Error, in words and figures as follows, to wit:

94 In the District Court of the United States for the District of Oregon.

ASTORIA MARINE IRON WORKS, a Corporation, Plaintiff,

vs.

UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION,
a Corporation, Defendant.

Petition for Writ of Error.

And now comes Astoria Marine Iron Works, a corporation, plaintiff herein, and says:

That on or about the 1st day of April, 1921, the District Court entered a judgment herein in favor of the defendant and against this plaintiff in which judgment and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of this plaintiff, all of which will more in detail appear from the assignment of errors which is filed with this petition;

Wherefore, this plaintiff prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of errors so complained of, and that a transcript of the record and the proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

W. M. CAKE,
R. H. CAKE,
L. A. LILJEQVIST,
Attorneys for Plaintiff.

Service by copy admitted this 27th day of April, 1921.

HALL S. LUSK,
*Asst. U. S. Attorney,
Of Attorneys for Defendant.*

Filed April 27, 1921.

G. H. MARSH,
Clerk.

95 And afterwards, to wit, on the 27th day of April, 1921, there was duly filed in said Court, an Assignment of Errors, in words and figures as follows, to wit:

96 In the District Court of the United States for the District of Oregon.

ASTORIA MARINE IRON WORKS, a Corporation, Plaintiff,

vs.

UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION,
a Corporation, Defendant.

Assignment of Errors.

The plaintiff in this action, in connection with its petition for writ of error, makes the following assignment of errors, which it avers exists:

1. The Court erred in sustaining the demurrer of the defendant.
2. The Court erred in dismissing plaintiff's action.
3. The Court erred in conceiving that it was without jurisdiction or power to entertain the action.
4. The Court erred in conceiving and adjudging that the Court of Claims of the United States had exclusive jurisdiction to entertain the action.

Wherefore, plaintiff prays that said judgment be reversed.

W. M. CAKE,
R. H. CAKE,
L. A. LILJEQVIST,
Attorneys for Plaintiff.

Service by copy admitted this 27th day of April, 1921.

HALL S. LUSK,
Assistant U. S. Attorney,
Attorneys for Defendant.

Filed April 27, 1921.

G. H. MARSH,
Clerk.

97 And afterwards, to wit, on Thursday, the 28th day of April, 1921, the same being the 46th judicial day of the Regular March term of said Court; present the Honorable Charles E. Wolverton United States District Judge, presiding, the following proceedings were had in said cause, to wit:

98 In the District Court of the United States for the District of Oregon.

ASTORIA MARINE IRON WORKS, a Corporation, Plaintiff,

vs.

UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION,
a Corporation, Defendant.

Order Allowing Writ of Error from Supreme Court to the District Court.

This 28th day of April, 1921, comes the plaintiff by its attorneys and files herein and presents to the Court its petition praying for the allowance of a writ of error, and the assignment of errors intended to be urged by it, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as are proper in the premises.

On consideration whereof the Court does allow the writ of error upon the plaintiff giving a bond according to law in the sum of \$500.00 which shall operate as a supersedeas bond.

CHAS. E. WOLVERTON,
Judge.

Filed April 28, 1921.

G. H. MARSH, *Clerk.*

99 And afterwards, to wit, on the 28th day of April, 1921, there was duly filed in said Court, a Bond on Writ of Error, in words and figures as follows, to wit:

100 In the District Court of the United States for the
District of Oregon.

ASTORIA MARINE IRON WORKS, a Corporation, Plaintiff,
vs.

UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION
a Corporation, Defendant.

Bond on Writ of Error.

Know all men by these presents, that Astoria Marine Iron Works, as principal, and Fidelity & Deposit Company of Maryland, a Maryland corporation, as surety are held and firmly bound unto United States Shipping Board Emergency Fleet Corporation, a corporation, the defendant above named, in the full and just sum of \$500.00 to be paid to said United States Shipping Board Emergency Fleet Corporation, its attorneys, successors or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally by these presents.

Sealed with our seals, and dated this 28th day of April, in the year of our Lord, One Thousand, Nine Hundred and Twenty-one.

Whereas, lately at a District Court of the United States in an action depending in said Court between Astoria Marine Iron Works, a corporation, plaintiff, and United States Shipping Board Emergency Fleet Corporation, a corporation, defendant, an order of dismissal and judgment was rendered against the said Astoria

101 Marine Iron Works, plaintiff, and the said Astoria Marine Iron Works having obtained a writ of error and filed a copy thereof in the Clerk's office of said Court to reverse the judgment in the aforesaid action, and a citation directed to the said United States Shipping Board Emergency Fleet Corporation citing and admonishing them to be and appear at a session of the Supreme Court of the United States to be holden at the City of Washington on the 27th day of June next.

Now, the condition of the above obligation is such, that if the said Astoria Marine Iron Works, plaintiff, shall prosecute said writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

ASTORIA MARINE IRON WORKS,
By THOMAS BILYEU,
Secretary,
Principal.

[Seal Fidelity & Deposit Company of Maryland.]

FIDELITY & DEPOSIT COMPANY OF
MARYLAND,
By FRANK E. SMITH,
Attorney-in-Fact.

Attest:

GEO. DUNARCY, *Agent.*

Sealed and delivered in the presence of:

B. A. BIHELHAUSEN
L. W. PENFIELD.

Approved by

CHAS. E. WOLVERTON,
Judge.

Service by copy admitted this 28th day of April, 1921.

HALL S. LUSK,
Asst. U. S. Atty.,
Attorneys for Defendant.

Filed April 28, 1921.

G. H. MARSH,
Clerk.

102 And afterwards, to wit, on the 28th day of April 1921, there was duly filed in said Court, a Certificate by the District Judge of question of jurisdiction, in words and figures as follows, to wit:

103 In the District Court of the United States for the District of Oregon.

ASTORIA MARINE IRON WORKS, a Corporation, Plaintiff,

vs.

UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION,
a Corporation, Defendant.

Certificate of District Judge Certifying the Question of Jurisdiction.

Be it remembered, that on the 28th day of April, A. D. 1921, this cause came on to be heard upon the motion of the defendant United States Shipping Board Emergency Fleet Corporation to dismiss the said action on the ground that the District Court of the United States for the District of Oregon had no jurisdiction as a Federal Court over the subject matter of the cause and the Court upon due consideration of said motion and after hearing argument of counsel sustained the same on the sole ground that this court had no jurisdiction of said cause as a Federal Court and accordingly directed that a judgment be made and entered herein dismissing said action for want of jurisdiction, and that pursuant thereto an order of dismissal was duly made and entered herein in which it was considered, ordered and adjudged that said action be and the same was thereby dismissed for want of jurisdiction, and this ruling of the Court is hereby certified to the Supreme Court of the United States, and the opinion filed herein is made a part of the record and will be certified and sent up as a part of the proceedings together with this certificate.

I hereby certify that the matter in controversy herein, as shown by the record, exceeds in value \$10,000.00 exclusive of interest and costs.

Dated this 28th day of April, 1921.

CHAS. E. WOLVERTON,
*Judge of the United States District
Court for the District of Oregon.*

Service by copy admitted this 27th day of April, 1921.

HALL S. LUSK,
*Asst. U. S. Atty.,
Attorneys for Defendant.*

Filed April 28, 1921.

G. H. MARSH,
Clerk.

And afterwards, to wit, on the 28th day of April, 1921, there was duly filed in said Court, a Præcipe for Transcript of record in words and figures as follows, to wit.

In the District Court of the United States for the District of Oregon.

ASTORIA MARINE IRON WORKS, a Corporation, Plaintiff,

v.

UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION,
a Corporation, Defendant.

Præcipe for Record.

The Clerk of this court is hereby directed to prepare and certify a transcript of the record in the above entitled case for use of the Supreme Court of the United States by including therein the following:

Complaint filed in the Circuit Court of Multnomah County, Oregon, on August 31, 1920:

Order of removal to the District Court of the United States for the District of Oregon, entered September 23, 1920, by said Circuit Court.

Demurrer filed to complaint on November 15, 1920, in the District Court of the United States for the District of Oregon

Order sustaining demurrer entered in the District Court on February 14, 1921.

Order of dismissal entered in District Court on April 1, 1921.

Petition and writ of error filed on April 27, 1921.

Assignment of error filed on same date.

Order allowing writ of error entered April 28, 1921.

Bond on writ of error filed April 28, 1921.

Certificate of District Judge certifying the question of jurisdiction, filed April 28, 1921.

Citation issued on April 28, 1921.

Dated at Portland, Oregon, this 28th day of April, 1921.

W. M. CAKE,

R. H. CAKE,

L. A. LILJEQVIST,

Attorneys for Plaintiff in Error.

Filed April 28, 1921.

G. H. MARSH,

Clerk.

107 And afterwards, to wit, on the 28th day of April, 1921,
there was duly filed in said Court, a Notice of Filing præcipe
for transcript, in words and figures as follows, to wit:

108 In the District Court of the United States for the District of
Oregon.

ASTORIA MARINE IRON WORKS, a Corporation, Plaintiff,

v.

UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION,
a Corporation, Defendant.

Notice of Filing of Præcipe.

To Lester Humphreys, United States Attorney; Hall S. Lusk,
Assistant United States Attorney, and MacCormac Snow, Attor-
neys for defendant, United States Shipping Board Emergency
Fleet Corporation:

Please take notice that on the 28th day of April, 1921, the under-
signed filed with the clerk of this court a præcipe for record to be
transmitted to the Supreme Court of the United States on the writ
of error sued out in the above cause, a copy of which præcipe is
herewith served on you.

Dated this 28th day of April, 1921.

W. M. CAKE,

R. H. CAKE,

L. A. LILJEQVIST,

Attorneys for Plaintiff, Marine Iron Works.

Service of the within notice and copy of præcipe is hereby ac-
cepted this 28th day of April, 1921.

HALL S. LUSK,

Assistant United States Attorney,

Attorneys for United State Shipping Board

Emergency Fleet Corporation.

Filed April 28, 1921.

G. H. MARSH,

Clerk.

109 UNITED STATES OF AMERICA,
District of Oregon, ss:

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, pursuant to the foregoing writ of error and in obedience thereto, do hereby certify that the foregoing pages numbered 5 to 108, inclusive, constitute the transcript of record in a cause in said court in which the Astoria Marine Iron Works, a corporation, is plaintiff and plaintiff in error, and the United States Shipping Board Emergency Fleet Corporation, a corporation, is defendant and defendant in error; that said transcript has been by me compared with the original record in said cause and the said transcript is a full, true, and complete transcript of the record and proceedings had in said court in said cause as the same appear of record and on file at my office and in my custody. I further certify that I return with the said transcript of record annexed thereto the original writ of error issued in said cause and the original citation filed therein.

In testimony whereof, I have hereunto affixed my hand and the seal of said court, at Portland, in said district, this 2d day of June, 1921.

[Seal United States District Court, Oregon.]

G. H. MARSH,
*Clerk United States District Court
for the District of Oregon.*

[Endorsed:] United States Supreme Court. Astoria Marine Iron Works, a corporation, Plaintiff in Error, vs. United States Shipping Board Emergency Fleet Corporation, a corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the District Court of the United States for the District of Oregon.

Endorsed on cover: File No. 28,331. Oregon D. C. U. S. Term No. 376. Astoria Marine Iron Works, Plaintiff in Error, vs. United States Shipping Board Emergency Fleet Corporation. Filed June 25th, 1921. File No. 28,331.

